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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

URBAN PLUMBING & HEATING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the opinion and order of the United States Court of Claims entered in this case on March 14, 1969.[1]

OPINION BELOW

The opinion and order of the Court of Claims (App. 25–44) is reported at 408 F. 2d 382. The opinion and findings of the Armed Services Board of Contract Appeals (App. 45*ff.*) are reported at 66–2 BCA ¶ 6062, ASBCA No. 9831.

[1] Although the decision of the Court of Claims is interlocutory in the sense that it does not finally grant or deny relief, but simply remands for computation of the amount of recovery, this Court has jurisdiction under 28 U.S.C. 1255(1). *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155; *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138.

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JURISDICTION

The opinion and order of the Court of Claims was entered on March 14, 1969. By an order of June 4, 1969, the Chief Justice extended the time for filing a petition for a writ of certiorari to July 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether an amendment to a government contract is voidable for duress merely because it was agreed to after a government agent threatened cancellation for default in circumstances ultimately found not to have constituted culpable default, there being no proof either of bad faith on the agent's part or of incapacitating financial weakness on the part of the contractor.

2. Whether the Court of Claims exceeded the scope of review permitted it by the Wunderlich Act on review of factual findings of government boards of contract appeals.

STATUTE INVOLVED

The Wunderlich Act, Act of May 11, 1954, c. 199, 68 Stat. 81, 41 U.S.C. 321, provides in relevant part:

> Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representatives or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be

filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

STATEMENT

In June, 1961, the Urban Plumbing and Heating Company was awarded a fixed-price contract, as low bidder, for the modification of the central heating and power plant at Eielson Air Force Base, Alaska. The contract specified that the work was to be completed within 120 days after the notice to proceed. That notice was issued on June 30, 1961, thereby fixing the completion date as October 28, 1961. Compliance with the specified completion date was important because the contract work involved shutting down a portion of the Base heating plant, which could not be done during the Alaskan winter.

Among the contract requirements was the installation of three sorts of furnace appliances—coal scales, combustion air coils, and ash removal equipment. The specifications for these appliances were fully described, and the contract required the contractor to submit drawings of the equipment he proposed to install for approval. (Contract Sec. 5–04; App. 48). Equipment other than that specified would be approved only if

"equal" to the specified equipment;[2] and, it was provided, "[n]o extension of contract time will result from submission of material and equipment data which does not fulfill the requirements." *Ibid.* The contract also provided for a procedure by which conformity to the specifications would be measured—submission of the specifications of substitute equipment to a designated architect-engineer.

On July 11 and 13, 1961, two weeks after the notice to proceed had been given, the contractor submitted initial data as to each of the three items of equipment (Pl. Ex. 41,[3] Govt. Exs. E, G, H; App. 47). On July 17, although he had not yet formally been retained (Tr. 476–481),[4] the Architect-Engineer informed the contractor orally that he would reject the

[2] As to the coal scales, the contract provided:

> The coal scale shall be of the stationary, automatic, dustproof, batch type, Model 46, manufactured by Stock Equipment Company, or approved equal.
> (Sec. 5-09; App. 49)

As to the combustion air coils, the contract provided:

> Equipment differing from that specified may be proposed, provided the Contractor clearly states such differences and provided all essential requirements of the specifications are met. If the equipment offered under this provision is, in the opinion of the Contracting Officer, equal or better than that specified, it will be given consideration.
> (Sec. 7-02B; App. 51)

As to the ash removal equipment, the contract provided:

> It is the intent of the drawings and specifications that equipment for this contract shall be as manufactured by the United Conveyor Corporation, or approved equal.
> (Sec. 8-04; App. 52)

[3] The exhibits were in the proceedings before the Armed Services Board of Contract Appeals ("Board").

[4] "Tr." designates the transcript of proceedings before the Board.

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proposed coal scales and combustion air coils, and the contractor promptly cancelled his orders for that equipment (Pl. Exs. 3, 5; App. 56).[5] Regarding the ash removal equipment, the Architect-Engineer told the contractor that the data was insufficient to permit review (Pl. Ex. 3; App. 55); additional data was submitted August 8, 1961 and he disapproved the equipment on August 29, 1961, in a letter received by the contractor September 5, 1961. (Pl. Exs. 14, 23, 31, 33; App. 57).

Partly as a result of these disapprovals, the contract was not completed by October 28, 1961. During September, when it became apparent that this would happen, negotiations towards an extension of the deadline were begun. The contractor first requested a 90-day extension; when he was offered 30 days, he returned with a request for 120. (Rule 4 File[6] Doc. 9, 11, 13; App. 59). At this point, the deadline had expired, and the contracting officer offered a 69-day extension, corresponding to the total time elapsed between the June 30 notice to proceed and the September 5 disapproval of the ash removal equipment.[7] *Ibid.* This offer thus made no adjustment to reflect the insufficiency of the initial data, the time then taken to submit additional data, or a reasonable period of time the Architect-Engineer might have taken to pass on the submis-

[5] The formal letters of rejection for these items were received August 7, 1961 (Pl. Exs. 20, 21; App. 56).

[6] The "Rule 4 File" is the official file of documents pertaining to the contract, placed in the administrative record pursuant to Rule 4 of the Armed Services Board of Contract Appeals Rules.

[7] Here the contracting officer made an arithmetical error; the time elapsed between June 30 and September 5 is 67 days.

sion.[5] As an alternative—since at least some of the work on the heating plant would not have been possible during the Alaskan winter—the contracting officer offered a Supplemental Agreement extending the completion date to June 30, 1962, subject to the proviso that the extension "neither increases or decreases contract costs." (App 59.) The officer stated that he would terminate the contract for default if the contractor rejected both alternatives (App. 60),[6] and insisted that a choice be made "within a very few days, two or three days anyway." (Tr. 83). After securing a change of language from "no increase in cost" to "no increase in price,"

[5] At the Board hearing the contracting officer testified that the offer of 69 days was made on the assumption that "the Government takes a flat zero for approval of data which I think is maybe a little unrealistic on the Government's side, I think we are entitled to more than that in our normal approval channel up there, it was from 15 to 30 days, but I wanted to give him the benefit of the doubt since my job is not only to protect the Government, but also to protect the company, or the contractor." (Tr. 131; see also Tr. 220).

[6] The contract provided that "the right of the Contractor to proceed shall not be terminated [for default] * * * because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including * * * acts of the Government, in either its sovereign or contractual capacity * * * and unusually severe weather" (App. 34). The contracting officer's threat to terminate for default thus necessarily asserted that the delay which had occurred, and the concomitant difficulties introduced by the approach of the Alaskan winter, were not entirely due to acts of the Government. Although the Supplemental Agreement as signed states that the delay was granted due to "adverse weather conditions and Government delay in approval of data," (App. 28), that agreement is a compromise of the conflicting claims of the parties.

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the contractor signed the Supplemental Agreement on November 16, 1961 (Tr. 84–85, 104–107; App. 28).[10]

Urban completed the contract by June 30, 1962, and then made a claim for the costs it had incurred as a result of the delay past the original contract deadline. The Armed Services Board of Contract Appeals denied that claim, after hearing, on the ground that it was barred by the Supplemental Agreement (App. 45). Relying on the testimony of the Architect-Engineer that the equipment the contractor submitted for approval in July and August had significantly deviated from the contract specifications (App. 18–19), it found that the contractor was partially responsible for the delay in delivery of the equipment and therefore "was not entitled to a time extension adequate to permit completion of the work" (App. 64). It followed that the extension permitted by the Supplemental Agreement was valuable consideration, sufficient to support it. *Ibid.* Moreover, the Board concluded, that agreement was not invalid for duress:

> Where the contracting officer threatens default termination, and the contractor is actually in default, the contracting officer was threatening

[10] The contracting officer proposed the Supplemental Agreement to Mr. Brewer, the contractor's Alaska Superintendent. Although Brewer had authority to sign the Agreement, he told the officer that he wished first to speak with Mr. Urban, the president of the contractor. He called Mr. Urban, who told him to sign the Agreement provided that the "no increase in cost" language was changed to "no increase in price." Brewer then went back to the contracting officer and advised him that he would refuse to sign unless this change was made. The contracting officer agreed to the change, and the Supplemental Agreement was signed. (Tr. 81, 84–85, 104–105, 107, Gov't Ex. 4; App. 60).

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> to do only what he had the right to do. This is not duress. [Citation]. In the instant case the appellant was in default for the completion date was 18 days past when the modification was signed. At least as to the coal thaw shed only 3 days of the delay was excusable.[11] The contracting officer offered 69 days time extension because of the delay in approvals. This would not have permitted completion, but we cannot find that it was not as much as was due for excusable cause.

Ibid.

Urban then brought this action in the Court of Claims. That court rejected the Board's finding that the contractor was partially responsible for the delay "because it offered equipment which did not meet the contractual requirements * * *." *Ibid.* The court considered that the specifications should have been construed to permit any equipment which would function as well as the specified equipment, and concluded that "the Board never found, and there is no proof," that the equipment offered by the contractor deviated from the specifications as so construed. (App. 30, n. 3).

Having found therefore that the government was solely responsible for the delay which prevented com-

[11] The coal thaw shed was a portion of the project which the Air Force urgently wished to complete as quickly as possible, since in its present condition it was a major fire hazard. (Tr. 266, 268; App. 58). The work on the coal thaw shed did not involve any of the equipment disapproved by the architect engineer (Tr. 45–52, 58–68). The three days delay which the Board found to be excusable was caused by an error in the contract drawings. (App. 59).

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pletion by the original contract deadline, the court held that

> * * * under the circumstances of this case, the contracting officer had no right to terminate the contract, except for the convenience of the Government, and when he threatened to do so to force the plaintiff to sign the supplemental agreement, he was guilty of coercion and duress against the contractor.

(App. 35). Accordingly, the court held that the Supplemental Agreement was invalid, and thus did not constitute a bar to recovery of the contractor's costs in excess of the contract price. It remanded the case to the Board for determination of the amounts due.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below, permitting the contractor to recover its delay-related costs, overhead, and profit in excess of the fixed contract price on the theory that the contracting officer's threat to cancel for default constituted duress invalidating the Supplemental Agreement, is not only unsound but conflicts with the decisions of this Court in *Hartsville Mill* v. *United States,* 271 U.S. 43, and of the United States Court of Appeals for the District of Columbia Circuit in *Board of Trustees* v. *O. D. Wilson Co.,* 133 F. 2d 399. It extends the concept of duress and thereby substantially undercuts the government's ability to defend its interests in contract renegotiations by making compromise agreements unenforceable by the government whenever its negotiators have asserted contract rights later held unfounded, without regard

to good faith, the financial strength of the contractor, or other relevant circumstances.

The opinion of the Court of Claims recites that "[w]hether or not duress exists in a particular case, depends on the facts in the case" (App. 35). But the sole fact on which the Court of Claims relied to show duress was the contracting officer's threat to terminate for default in a situation held after the fact not to involve culpable default. There was no evidence, and no finding by the Board or the court, that the contracting officer acted in bad faith or with knowledge that he had no right to terminate for default. In light of the Board's finding that the contractor was in default and the substantial evidence supporting that finding, it would be impossible to conclude that the contracting officer so acted. There was also neither evidence [12] nor any finding [13] that the contractor was in such bad financial condition that it could not insist in its rights and bring suit in

[12] The only remotely relevant evidence as to financial condition was a notation in a memorandum written by the contracting officer, stating: "In discussion with Mr. Brewer [Urban's Alaska Superintendent] he has indicated that his company has had considerable bad luck on several construction projects this year. They have had approximately $3,000,000 worth of business and it seems as tho all other projects have gone sour. They had some flooding conditions on a city project." (Govt. Ex. A). This notation does not show that Urban was in such bad condition as to be unable to insist on its rights.

[13] The Board stated in its opinion that "from [the contractor's] viewpoint, default termination was unthinkable" (App. 60), but did not suggest that this was because of financial inability to insist on its rights. Such termination would be unthinkable, for example, to a contractor who realized he was likely to *lose* any such litigation as having in fact been in material default.

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event of termination, rather than sign a supplemental agreement it did not wish to sign. Indeed, both the extended period of negotiations over the delay as a whole and Urban's successful insistence upon a change of language in the contract suggest that the Supplemental Agreement was freely entered.

Under the existing case law, two facts must be shown for a threat of contract cancellation to constitute duress invalidating a contract amendment: (1) that the threat was made in bad faith, with knowledge that the other party was not in default; and (2) that the other party was not in financial condition to stand on its rights rather than accept the contract amendment. The leading case is *Hartsville Mill* v. *United States*, 271 U.S. 43. There the government made a threat to "disregard the admitted obligations of its contracts unless those entitled to the performance of them would yield to its demands." 271 U.S. at 48–49. Characterizing this threat as "discreditable", Mr. Justice Stone nevertheless held for the unanimous Court that the contract amendment which resulted from the threat was not invalid for duress (271 U.S. at 49):

> But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate. * * *

Since such consequences had not been shown, the Court concluded that duress could not be found. 271

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U.S. at 47–48. See also *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 300–305.

The Court of Appeals for the District of Columbia Circuit, in a similar case, held that a government contract was not void for duress when made under the government's threat to forfeit the contractor's bid bond, even though the bid bond may have been rescindable for an error in the bid:

> [The contractor] contends that it made the contract under duress, since [the government] threatened to forfeit the bid bond if it refused to contract in accordance with the bid. But if [the contractor] had, as it insists, a right to rescind, [the government] had no power to make good its threat. Its denial of the right to rescind did not conclude the question. [The contractor] could litigate it. * * * [The contractor] simply chose to contract and perform rather than have its right to rescind judicially determined. It is bound by the contract and cannot recover in this action.

Board of Trustees, etc. v. *O. D. Wilson Co.*, 133 F. 2d 399, 400. The court restated its position in a case between private litigants shortly thereafter, in the following terms:

> [A]ppellees were entitled to litigate, or threaten to litigate, the question whether appellants' failure to make improvements ended their rights under the lease. Where there is a genuine controversy, a threat to sue is not duress. * * *

Portland Hotel Corp. v. *Fidelity Storage Corp.*, 134 F. 2d 57. Accord: 5 Williston, *Contracts* § 1606, pp. 4501–4502 (rev. ed. 1937). State authorities agree

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that a threat to cancel a contract not in fact subject to cancellation is not duress *per se;* there must be proof that the threat was made in bad faith, and that the other party was not in a position to have obtained an adequate remedy by suing for damages if the threat were carried out.[14] The facts of cases previously decided against the government on duress grounds in the Court of Claims also bring them within these principles.[15]

We recognize, of course, that what was found not to constitute duress in *Hartsville Mill, supra,* might be found to be so today.

> [T]he modern tendency * * * is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction.

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[14] *Williamson* v. *Bendix Corp.*, 289 F. 2d 389, 392–393 (C.A. 7) (applying Ind. law); *W. R. Grimshaw Co.* v. *Nevil C. Withrow Co.*, 248 F. 2d 896, 903–905 (C.A. 8), certiorari denied, 356 U.S. 912 (applying Ark. law). *Bennett* v. *Mahon*, 180 F. 2d 224, 231 (C.A. 8) (applying Mo. law), certiorari denied, 339 U.S. 980; *Vines* v. *General Outdoor Advertising Co.*, 171 F. 2d 487 (C.A. 2) (applying N.Y. law); *Tri-State Roofing Co. of Uniontown* v. *Simon*, 187 Pa. Super. 17, 142 A. 2d 333; *Gill* v. *S.H.B. Corporation*, 322 Mich. 700, 34 N.W. 2d 526; *Val-Rich Corporation* v. *Tole Electric Co.*, 196 So. 2d 486 (Fla. App.). Where contract amendments have been voided for duress, both bad faith and lack of an adequate legal remedy was clear. *King Construction Co.* v. *W. M. Smith Electric Co.*, 350 S.W. 2d 940 (Tex. Civ. App.); cf. *Ross Systems* v. *Linden Dari-Delite, Inc.*, 35 N.J. 329, 173 A. 2d 258.

[15] *E.g., Aircraft Associates* v. *United States*, 357 F. 2d 373; *WRB Corp.* v. *United States*, 183 Ct. Cl. 409, 468–469; *Shewan & Sons* v. *United States*, 73 Ct. Cl. 49, 79–95; compare *Alloy Products Corporation* v. *United States*, 302 F. 2d 528, 530.

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5 Williston, *Contracts* § 1603, p. 4495; *Hellenic Lines, Ltd.* v. *Louis Dreyfus Corp.*, 372 F. 2d 753, 756–758 (C.A. 2). And the existence of a remedy at law—such as the contractor here would have had under the Court of Claims' view that he was blameless—is not necessarily a conclusive answer where the contractor's financial position or some other factor renders it inadequate. 5 Williston, *Contracts* § 1620, pp. 4529–4533. But the Court of Claims' holding in this case was made in the absence of information about the contractor's financial situation; and the only wrongfulness in the contracting officer's assertion that he would invoke the contractual remedy of default was in his judgment, ultimately found to have been erroneous, that he was entitled to do so. "[A] threat * * * to resort to remedies given by the contract is not * * * duress * * * even though there is no legal right to enforce the claim, provided the threat is made in good faith; that is, in the belief that a possible cause of action exists." 5 Williston, *Contracts* § 1606, pp. 4501–4502; and see *id.* at § 1607, p. 4504; *Automatic Radio Mfg. Co.*, v. *Hazeltine Research*, 176 F. 2d 799, 804–805 (C.A. 1), affirmed, 339 U.S. 827. None of the authorities suggests that a threat to cancel a contract not actually subject to cancellation is duress *per se*.

The question is important. By in effect adopting a *per se* rule, the Court of Claims has severely limited the government's ability to engage in the negotiations which are frequently required in the administration of government contracts. Often, contracts cannot be completed on time or delay or other factors create a cost overrun; there is very often a dispute as to

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who is responsible for the problem. Negotiations on revised contract terms, looking toward avoidance of the drastic steps of litigation or default, are the usual and desirable first step in the resolution of these disputes. Since the allocation of responsibility for the delays and/or overruns will bear heavily on the terms of the revisions made, each side can be expected to press forcefully its views on that issue and the contract remedies therefore available to it. But under the Court of Claims' opinion, the government's negotiator is subjected to an unequal burden of accuracy; if despite his good faith belief that default has occurred the court later concludes that it did not, his representations will be construed as duress if they include or can be interpreted as a threat to cancel. The holding thus imposes an unwarranted limitation on the ability of contracting officers to negotiate and settle disputes in the performance of government contracts.

2. The previous discussion assumes that the Court of Claims correctly found the contractor not to have been in default. But the Board of Contract Appeals had found that it was at fault for the delay—both with respect to the coal thaw shed, where none of the challenged equipment was required, and with respect to the equipment, because it failed to meet the contractual requirements (App. 64). In rejecting the Board's findings and in effect entering its own contrary findings, the court exceeded its power under the Wunderlich Act, 41 U.S.C. 321, which confines it to substantial evidence review of administrative findings.

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As is set out at length in this Court's opinion in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, the rationale of the Wunderlich Act, enacted in 1954, was to relieve certain restrictions on Court of Claims review of the findings of government contract boards operating under the "disputes" clause of government contracts. These restrictions had last been stated in this Court's decision in *United States* v. *Wunderlich*, 342 U.S. 98, 100. The dominant purpose of the Act was to permit the Court of Claims to act essentially as any other court reviewing the findings of an administrative agency. 373 U.S. at 713–718. The history of the Act in this Court shows, however, that the Court of Claims has tended to assume authority above and beyond that which reviewing courts generally exercise over administrative agencies; the government has come to this Court on three occasions in order to protect that finality of administrative findings which the Act does require. Thus, in *Bianchi, supra*, this Court dealt with the practice of holding *de novo* trials to determine whether administrative findings were supported by substantial evidence. In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, this Court rejected the position of the Court of Claims that in ruling on claims outside the scope of the disputes clause it could ignore administrative findings made under that clause in related claims under the same contract. And in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, this Court rejected the assumption of authority to hold a *de novo* trial and make findings where an administrative board had erroneously failed to make them, and required the

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court, in effect, to remand to the Board for such proceedings.

In the present case, the court has avoided its obligation to accord finality to administrative findings by purporting to apply the substantial evidence rule, but then ignoring substantial evidence in the record supporting the findings. A decision involving application of the substantial evidence rule to a particular set of facts would not normally warrant review by this Court. There has, however, been a pattern of similar decisions having the cumulative effect of a reassumption by the Court of Claims of a large measure of the *de novo* review power which it lost when this Court put an end to its practice of taking new evidence. This case and *Woodcrest Construction Co.* v. *United States,* 408 F. 2d. 406 (Ct. Cl.), in which the government is filing a petition for certiorari together with the present petition, are the latest in this series of decisions. The approach taken in these cases should be reviewed by this Court with a view to restoring the proper balance between the Court of Claims and the administrative contract boards in government contract cases.

In the present case, the court overturned the administrative finding (that the contractor was partially at fault for the delay "because it offered equipment which did not meet the contractual requirements" (App. 64)) by simply ignoring the evidence on which it was based. In a footnote, the court brushed this finding aside, stating that "[t]here is no showing that plaintiff was responsible for any substantial part of the delay" and that there is "no proof" that

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the equipment proffered by the contractor failed to meet the requirement of functional equality with the equipment required by the specifications. (App. 30–31).[16] It then proceeded to decide the case on the basis of what was in effect its own finding that the contractor was without fault. Establishment of such a new factual premise was, however, beyond the authority of a reviewing court in light of the facts supporting the Board's findings.

The Architect-Engineer, who disapproved the equipment offered by the contractor, testified before the Board that the equipment differed from the contract

[16] The Court of Claims referred to the contracting officer's offer of a 69-day time extension, in a letter stating that 69 days "is considered the time delay which was beyond the control of the contractor." (App. 37). Sixty-nine days was the total time elapsed between the notice to proceed and the final disapproval of the ash removal equipment. *Ibid.* (but see n. 7, *supra*). The contracting officer's letter was thus evidence to support a conclusion that the government alone was responsible for the delay. However, the evidence was qualified by the contracting officer's testimony that his offer of 69 days was intentionally over-generous. (Tr. 131; text, *supra*, at pp. 5–6 and nn. 8–9). It did not relieve the Court of Claims from the responsibility of reviewing the whole record, including the testimony of the Architect-Engineer in support of the Board's finding that the parties were jointly responsible for the delay. Cf. *Dean Construction Co.* v. *United States*, Ct. Cl. No. 96–67 (June 20, 1969) (formal findings of contracting officer "constitute a strong presumption or an evidentiary admission of the extent of the government's liability [but] are always subject to rebuttal".).

Nor could the Court of Claims rationally conclude that the Board found the government to be solely responsible for any particular period of delay, in view of the Board's finding that the parties were "jointly responsible" and that it was "unable to apportion the causes of delay." (App. 64).

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specifications in several respects having an important bearing on the operation and maintenance of the Base heating plant. Regarding the ash removal equipment, he noted that the proposed equipment had not met reliability requirements which seemed particularly important in view of Alaska's remoteness and the harshness of its winters, and that it embodied a feature which—unlike complying equipment—would have required replacement of parts every three or four weeks (Tr. 482–483, 488, 524; Pl. Exs. 31, 33; App. 52–55). The coal scales submitted, unlike those specified, had only a slight gradient between coal bunker and furnace ,which would make it hard to feed in frozen coal (Tr. 495–497, 499, 502–503), and used a type of conveyor belt which could be repaired only by technicians who would have to come from Seattle (Tr. 499). The combustion air coils submitted would have presented a maintenance problem during the coldest weather—the most critical time—which the specified coils would not present (Tr. 508), and were conceded not to meet the specifications by a representative of the manufacturer (Tr. 506–507). Although there was contrary testimony and evidence tending to show that the equipment did conform to the specifications (Tr. 463–464; Pl. Exs. 6, 17, 19, 37, 39; Govt. Ex. E), the Board's finding accepted the Architect-Engineer's testimony (App. 48–55). Moreover, the Board also found that the contractor was in default in its work on the coal shed, where the challenged equipment was not involved and only three days' delay was excusable (n. 11, *supra;* App. 58–59, 64). The court simply ignored this finding in

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concluding that the contractor was not culpably in default when the contracting officer threatened termination.

We do not contend that the court was required to affirm the Board's opinion, since certain portions of it are confusing and might be read to indicate that the Board was adopting an erroneous legal standard.[11] But the proper remedy in such a case, where there is substantial evidence to support the Board's findings under a proper legal approach, is to remand the case for reconsideration under a correct standard; the Court of Claims may not make its own findings on conflicting evidence in the administrative record. See *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 433, n. 10. In making such findings, the court

[11] The first two paragraphs of the Board's opinion have some language which appears to ignore the "or equal" clauses of the specifications (see n. 1, *supra*), which the Court of Claims reads to require acceptance of equipment that is functionally equivalent to the equipment described in the specifications. See *Jack Stone Co.* v. *United States*, 170 Ct. Cl. 281, 344 F. 2d 370. However, the opinion does state: "Many of the specified details may have been unnecessary. *Others were clearly desirable for this particular application, and some of these details were not met by the offered equipment*" (App. 62, emphasis added). Moreover, Board Findings 7a and 7b are clearly addressed to functional differences between the specified equipment and the equipment offered by the contractor (App. 50).

The last paragraph of the Board's opinion might be read to indicate that any failure to meet the completion date would be a default by the contractor, regardless of who was responsible for the delay (App. 64). This would be an erroneous view of the law, as the Court of Claims pointed out (App. 34).

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clearly exceeded its review powers under the Wunderlich Act.[18]

There are disturbing indications that the decisions of the Court of Claims here and in *Woodcrest Construction Co., supra,* are not isolated examples. Since this Court's decisions in *United States* v. *Anthony Grace & Sons, Inc.,* 384 U.S. 424, and *United States* v. *Utah Construction & Mining Co.,* 384 U.S. 394, finally precluded the Court of Claims from taking new evidence on questions within the contract boards' jurisdiction under the disputes clause, that court has assumed a large measure of *de novo* review power by simply reweighing evidence in administrative records. A review of the reported decisions of the Court of Claims between the date of the *Grace* and *Utah* decisions (June, 1966) and the current decisions (March, 1969) shows that of the 87 government contract cases in which decisions of administrative contract boards were under review on the basis of the administrative record, 35 cases (40%

[18] The court would have had authority under the Act to interpret the contract in the light of the Board's findings. But it would have been unjustified in holding under the contract that the government had no right to terminate the contract in November, 1961 despite the contractor's culpable default because it, too, was responsible for some delay. Section 5-04 of the contract specifications provided that "[n]o extension of contract time will result from submission of material and equipment data which does not fulfill the requirements." Section 5 of the contract provided that "[t]he right of the Contractor to proceed shall not be terminated * * * because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor * * *." (App 34).

of the total) were reversed in whole or part. It is difficult to tell how many of the reversals were based on a reweighing of evidence in the administrative record, since the court's opinions, as here, do not always reveal the extent of the evidence supporting the administrative decision, and frequently treat as questions of law (not subject to Wunderlich Act finality) issues which involve a large factual element.[19] However, the court has clearly reviewed the evidence and rejected administrative factual findings in at least 13 cases (15% of the total cases decided, and 37% of the reversals);[20] of these 13, 6 were decided in the last 6 months of the period surveyed, representing 40% of the 15 cases decided in those months (October

[19] For example, the court so treated the issue of duress here (App. 35). In some cases, it goes so far as to enter formal or additional findings of fact. *Kraus* v. *United States*, 366 F. 2d 975; *Bolander* v. *United States*, 186 Ct. Cl. 398; *KECO Industries* v. *United States*, 364 F. 2d 838. Making such findings of fact in the course of reviewing an administrative record is inconsistent with the limitations on the court's role underlined in *Utah* and *Grace*.

[20] *United Contractors* v. *United States*, 177 Ct. Cl. 151, 368 F. 2d 585; *Johnson & Sons, Inc.* v. *United States*, 180 Ct. Cl. 969; *Loral Electronics Corp.* v. *United States*, 181 Ct. Cl. 822; *S. S. Mullen Inc.* v. *United States*, 182 Ct. Cl. 1, 389 F. 2d 390; *Sundstrand Turbo* v. *United States*, 182 Ct. Cl. 31, 389 F. 2d 406; *Centre Manufacturing Co.* v. *United States*, 183 Ct. Cl. 115, 392 F. 2d 229; *Morrison-Knudsen Co.* v. *United States*, 184 Ct. Cl. 661; *D & L Construction Co.* v. *United States*, 185 Ct. Cl. 736, 402 F. 2d 990; *Bell* v. *United States*, 404 F. 2d 975; *L. W. Foster Sportswear Co.* v. *United States*, 405 F. 2d 1285; *J. D. Hedin Construction Co.* v. *United States*, 408 F. 2d 424; *Woodcrest Construction Co.* v. *United States*, 408 F. 2d 406; *Urban Plumbing and Heating Co.* v. *United States*, 408 F. 2d 382.

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1968 through March 1969).[21] While it would unduly lengthen the petition were we here to discuss the merits of each of these cases, we believe they bear out our concern that, as shown by the opinions in *Woodcrest Construction Co.* and the present case, the Court of Claims is not heeding the limitations inherent in the substantial-evidence standard of review prescribed by the Wunderlich Act.[22] The effect is to transfer to the Court of Claims the administrative fact-finding function.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ROBERT V. ZENER, *Attorney.*

JULY 1969.

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[21] *D & L Construction Co.* v. *United States*, *supra*; *Bell* v. *United States*, *supra*; *L. W. Foster Sportswear Co.* v. *United States*, *supra*; *J. D. Hedin Construction Co.* v. *United States*, *supra*; *Woodcrest Construction Co.* v. *United States*, *supra*; *Urban Plumbing and Heating Co.* v. *United States*, *supra*.

[22] Gamer, *After Two Years: Cases in the Court of Claims Since Utah and Grace*, Public Contract Newsletter, vol. 3, No. 3 (July, 1968), surveys the post-*Grace* and *Utah* decisons of the Court of Claims as of April, 1968. Commissioner Gamer concludes: "I found that the Boards were sustained in whole or in part in 41 cases * * * and that they were reversed in whole or in part in 23 cases. * * * Of the 23, six were reversed for lack of substantial evidence." Since Commissioner Gamer's survey, the trend of factual reversals seems to have accelerated.

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APPENDIX A

In the United States Court of Claims

No. 70–67

(Decided March 14, 1969)

URBAN PLUMBING & HEATING CO., AN OREGON CORPORATION v. THE UNITED STATES

Warde H. Erwin, attorney of record for plaintiff.
James A. Pemberton, Jr., with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The plaintiff, Urban Plumbing & Heating Company, is an Oregon Corporation. It entered into a contract with the Department of Defense, Alaska Air Command, of the United States on June 23, 1961, in which it agreed to make certain modifications in the central heating and power plant at Eielson Air Force Base, Alaska, for the sum of $487,775.[1] The contract required the work to be completed within 120 days after June 30, 1961, the day that notice to proceed was given. Performance was to commence about July 1, 1961, and the project was to be completed by October 28, 1961, well in advance of the usual beginning of severe winter weather in

[1] Contract No. AF 65(503)–1505.

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Alaska. In fact, the expected winter weather made it necessary for the project to be completed by October 28, 1961, because much of the work had to be done inside the central heating and power plant, and, while the work was going on, the plant had to be shut down. Since the plant supplied the heat and power for the air base, it could not be shut down during the severe Alaskan winter season. Under these circumstances, time was of the essence, because after the winter weather set in, it would be impossible for the plaintiff to work effectively on the project, either inside or outside of the plant.

The contract required the plaintiff to submit to the architect-engineer (hereinafter called AE) of defendant for approval or rejection the products it proposed to use in the project. The contract specified certain named brands, "or equal," of the items to be supplied by the contractor. The contractor was given the right to submit materials and equipment it proposed to use other than the named brands, but which it considered equal to those named. Of course, this arrangement required the defendant to promptly name or appoint an AE, otherwise the contractor would not have anyone to whom it could submit its products for approval.

The defendant delayed the appointment of the AE for a period of time. The defendant says the delay in the appointment was 18 days, but plaintiff contends it was 38 days and that it did not have notice of the appointment for 4 more days. We do not have to resolve this time dispute between the parties. However, we do take note of the fact that there was a substantial delay by defendant in appointing the AE. In our opinion, this delay materially affected the progress of the work, but, as will be seen below, it was not the only delay on the part of the defendant that the contractor encountered.

After the AE was appointed, the contractor submitted to him for approval samples of the products it proposed to use, as required by the contract. The contractor says these products were equal to or better than the named brands set forth in the contract. The AE delayed approval or rejection of the submitted items. In the meantime, plaintiff had tentative arrangements with suppliers of the products to furnish the

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items for the project, but the suppliers would not manufacture them until they were approved. Time was passing and both parties were getting nervous about the progress of the project. After a substantial delay, the AE rejected the products submitted by plaintiff as not meeting the specifications of the contract. There is a dispute between the parties as to how long the AE delayed making his decision, but it appears to be undisputed that he did wait an unreasonable length of time to make a decision and that this delayed the contractor in the performance of the work. The contractor was required to order the named brands of items listed in the contract after the AE rejected others submitted by it, and this required more time.

On August 30, 1961, the contracting officer notified plaintiff in writing that the Government considered plaintiff's progress a condition that was endangering the performance of the contract, and that unless the condition was cured within 10 days, the Government "may terminate subject contract for default." The plaintiff answered by its letter of September 7, 1961, in which it excepted to the Government's notice and pointed out the delays that had been caused by the Government. It asked for a time extension of 90 days because of these delays. The contracting officer answered this request in writing by letter of September 26, 1961, in which he admitted "since some time delay was caused by disapproval of material an extension of 30 days is considered fair and reasonable to cover the delay involved."

The contractor rejected the offer of a 30-day extension by its letter of October 18, 1961. It again detailed the delays caused by the Government and requested a time extension of 120 days.

The contracting officer answered this request in writing on November 13, 1961, in which he said, among other things:

> However, since the time required by the Government to approve or disapprove data submitted was over 30 days and in part is beyond the control of the contractor, a reasonable time extension is considered in order. In accordance with General Provision Clause 5(c) a time extension of 69 days (58+11) is considered the time delay which was beyond the control of the contractor.

As an alternative, the contracting officer offered an amendment to the contract which would give the contractor a 245 day extension (to June 30, 1962) provided it followed the work schedule prescribed by the Government and agreed to the following clause in the amendment:

> This supplemental agreement neither increases or [sic] decreases contract costs.

This extension would give the contractor 120 days after the winter was over to finish the project. This was equal to the total original time of 120 days.

A representative of the contractor met with the contracting officer on November 16, 1961, and at that meeting the contractor was given its choice of accepting the 69 day time extension, or signing the supplemental agreement mentioned above with a 245 day extension, or having the contract terminated for default. The contractor was required to make its choice within two days. It decided to sign the supplemental agreement provided that the word "costs" in the sentence quoted above be changed to "price." This was agreed to and the change was made. This agreement also contained the following statement:

> The above extension of time is granted due to adverse weather conditions and Government delay in approval of data.

The contractor finished the work within the 245 day time extension granted in the supplemental agreement. However, its costs in doing so were $79,905.22 more than the original contract price. An audit by the Air Force confirmed the correctness of this figure. The contractor presented his claim of $79,905.22 in extra costs, plus overhead of 15 percent of the total contract cost of $567,680.22 amounting to $85,152.03, plus profit of 10 percent on the total cost and overhead ($652,832.25) amounting to $65,283.25, plus cost of its bond (01 percent of $718,115.47) in the sum of $7,181.15, plus taxes in the sum of $1,795.38, making its total claim $239,316.98 (the difference between the original contract price of $487,775 and the final costs, plus overhead, profit, cost of bond and taxes as set forth above in the total sum of $727,091.98).

The contracting officer rejected plaintiff's claim and it appealed to the Armed Services Board of Contract Appeals (hereinafter called the Board), which also refused plaintiff's claim in its entirety in an opinion dated December 30, 1966, 66-2 BCA ¶6062. Its motion for reconsideration was denied by the Board on February 8, 1967.[3] The plaintiff filed suit in this court on March 13, 1967, and asserts the same claim that he made to the contracting officer and to the Board. The defendant filed an answer contesting plaintiff's claim. Both parties have filed motions for summary judgment which we will now consider.

The contract involved here contained the standard Suspension of Work clause. Therefore, plaintiff's delay claim is redressable at the administrative level. *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966). The plaintiff has exhausted his administrative remedies, except for the amount of his damages, and the case is now before us for review. The defendant insists that since this case falls within the purview of the Wunderlich Act, we are bound by the decision of the Board. It contends that the decision of the Board is supported by substantial evidence, is neither arbitrary, capricious, nor grossly erroneous, and that its determinations of questions of law are correct. The plaintiff, on the other hand, takes the opposite position on all of these points. It especially urges that the decision of the Board on questions of law is erroneous.

Both plaintiff and defendant have devoted most of their briefs to the question of whether or not there was an accord and satisfaction of all claims of the parties, past, present, and future, by their signing the supplemental agreement on November 16, 1961, wherein the plaintiff was given a time extension of 245 days to complete the contract and wherein it was stated that "This Supplemental Agreement neither increases or [sic] decreases contract price." The plaintiff says that the word "costs" was changed to "price" at its request and that it understood the meaning of the provision as changed to be that it would be entitled to collect additional costs if any were sustained by reason of the time extension.

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[3] ASBCA No. 9831, appeal of Urban Plumbing & Heating Company, under Contract No. AF 65(503)-1505.

Consequently, plaintiff says there was no accord and satisfaction of anything.

The defendant says that plaintiff was in default at the time the amendment was signed and it did not have to grant the time extension but could have defaulted the plaintiff; that the giving of the time extension was consideration for, and an accord and satisfaction of, all of plaintiff's claims, and that this was the plain meaning of the word "price" in the amendment. The Board agreed with the defendant.

It is our opinion that it is not necessary to reach the accord and satisfaction question in disposing of this case.

We start with the threshold question of whether or not the Government delayed the contractor, and, if so, how much and what were the consequences of such delay. The first part of this question is easily answered, because it is undisputed that the Government did delay the contractor. The contracting officer admitted this delay in his letters of September 26 and November 13, 1961, mentioned above. The amendment (Supplemental Agreement) signed by the parties on November 16, 1961, acknowledged such delay on the part of the Government when it provided that the time extension was granted "due to adverse weather conditions and Government delay in approval of data." Also, the Board found that the Government delayed the contractor. It stated in its opinion, "The respondent did unreasonably delay acting upon these submittals. * * * there is no reasonable excuse for delaying official action on the Durabilt submittal until 29 August * * *." Again, the Board said: "The parties were jointly responsible for the delay in delivery of the equipment, the appellant because it offered equipment which did not meet the contractual requirements, and the respondent because it delayed too long in rejecting it." We conclude that the Government did delay the contractor.[8]

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[8] There is no showing that plaintiff was responsible for any substantial part of the delay. As indicated in the quotation from its opinion set forth immediately above in the text, the Board erroneously assumed that the plaintiff was responsible for part of the delay "because it offered equipment which did not meet the contractual requirements." This statement fails to take account of the contractor's express right under the contract to propose for approval other materials and equipment which it considered equal to the brands specified. These "or equal" provisions did not mean that the proposed substitutes had to comply with every detail of the specifications (which were

How much delay was caused by the Government is more difficult to determine, but it seems clear that it was at least 69 days. In the contracting officer's letter of November 13, 1961, to the contractor, he said that the records of his office showed, "31 days government delay on disapproval of Richardson Scales & Combustion Coils" and "58 days government delay on disapproval of Durabilt Equipment." In the same letter he said "* * * a time extension of 69 days (58+11) is considered the time delay which was beyond the control of the contractor." The Board, in commenting on the 69 days offered by the contracting officer as a time extension said, "This was apparently computed as the total lapsed time between the notice to proceed and appellant's receipt of the rejection of the Durabilt ash removal equipment." The Board went on to say: "The contracting officer offered 69 days time extension *because of the delay in approvals.* * * * we cannot find that it was not as much as was due for excusable cause." We regard this as a finding by the Board that the Government did delay the contractor 69 days. If it could be said that the Board did not so find, then we conclude that the evidence on the matter was such that as a matter of law the Board could have made only one finding of fact with respect to it. Under these circumstances, we are authorized to make the finding on the question. *Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 631, 386 F. 2d 855, 870 (1967). Accordingly, we find that the contractor was delayed 69 days by the Government.

We now consider what effect this 69 day delay had on the performance of the contract by the contractor. We agree with the contractor that under the conditions existing in Alaska, there is a vast difference between 69 days in the summer and fall when working conditions are favorable and 69 days in

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based on particular brands, without naming them). The "or equal" clauses were designed to establish a "standard of equality" and meant only that the proffered "deviation" had to function as well as the specified equipment. See *Jack Stone Co. v. United States*, 170 Ct. Cl. 281, 344 F. 2d 370 (1965). The Board found that the plaintiff's proposals did not meet every single detail of the specifications, but the Board never found, and there is no proof, that these proposals failed to meet the "or equal" standard in the broader sense in which it should have been construed. On the record, therefore, the plaintiff cannot be held responsible for offering "equipment which did not meet the contractual requirements."

the wintertime when little, if any, work can be done. This was particularly true in this case, because the facts show that most of the work had to be done inside the heating and power plant. This plant had to be shut down in order for the plaintiff to work in it. The Government could not allow it to be shut down in winter, because it supplied heat and power for the air base. If the plaintiff worked at all inside the plant while it was in operation, there was danger of an explosion of the combustible coal dust found inside. For all these reasons, the plaintiff could not work inside of the plant during the winter months. It could not work outside the plant in the winter because of the extreme cold, snow, and ice existing in that area. The record shows that the winter of 1961-62 was a severe one in Alaska, with temperatures below zero much of the time. By the time the amendment to the contract was signed on November 16, 1961, the temperature had been as low as 20 degrees below zero and bitter cold prevailed most of the time.

The parties intended that the project be completed by October 28, 1961, before the onset of the Alaskan winter. The plaintiff did not contract to work under conditions which exist during the winter in Alaska. The Government delayed the work of the contractor 69 days, which prevented its completion of the project before winter. In other words, the delay caused by the Government would have required the contractor to have worked during the winter months even if a time extension of 69 days had been given and accepted, but, as has already been pointed out, work during the winter season was impossible. Even the Board said: "The 69 days would have been useless * * *." It is obvious that the Government realized the situation when it asked the contractor to accept a 245 day time extension, which would extend the time of performance through the winter and allow it 120 days thereafter to finish the project.

It is clear that at the time the Government made the three alternative propositions to the plaintiff on November 16, 1961, it had delayed the plaintiff until the date for the completion of the contract (October 28, 1961) had passed, through no fault of the contractor. The offer of a 69 day extension at that time meant nothing whatsoever, because even if it had been granted and accepted, the Government would not have

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allowed the contractor to work inside the heating and power plant for the reasons pointed out above. Neither could the contractor have worked outside the plant because of the winter weather. Therefore, the offer of a 69 day extension at that time of year was an empty gesture and amounted to nothing as far as the contractor was concerned.

All that was left of the alternatives was the demand of the Government that the contractor accept the 245 day extension of time upon the terms and conditions stated in the supplemental agreement, upon the threat of the Government that if the contractor did not so accept it, the contract would be terminated for default. The contractor was given only two days to make a choice. The contractor says this demand and threat amounted to coercion and duress under the circumstances, and that by reason thereof, it was forced to sign the amendment and accept the 245 day time extension. We agree with the contractor.

While it is true that at the time the amendment was signed on November 16, 1961, the time for the completion of the contract (October 28, 1961) had passed, and because of this fact, the contractor was technically in default. *Schlesinger* v. *United States*, 182 Ct. Cl. 571, 580–81, 390 F. 2d 702, 706–07 (1968). But it was a default that was excusable and due to circumstances beyond its control. In fact, it was a default caused by the Government itself. Under these circumstances, it was not such a default as would authorize a true termination for default by the Government in the sense that the contractor would be denied any recovery. It would be unreasonable, indeed, to allow the Government to terminate the contract for default when the default was caused by the Government's own acts, unless the termination is deemed to be for the convenience of the Government as is authorized by paragraph 5(d) of the contract.[4] In case of such a ter-

[4] Clause 5, Termination for Default-Damages for Delay—Time Extensions, is amended to add the following paragraphs (d) * * *:
"(d) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract was due to causes beyond the control and without the fault or negligence of the Contractor pursuant to paragraph (c) of this clause, such notice of termination shall be deemed to have been issued pursuant to the Termination for Convenience of the Government clause of this contract, and the rights and obligations of the parties hereto shall in such event be governed by such clause."

mination, the contractor is entitled to an equitable adjustment in accordance with the Termination for Convenience clause of the contract (paragraph 31). See *Litchfield Mfg. Corp.* v. *United States*, 167 Ct. Cl. 604, 613, 338 F. 2d 94, 95 (1964); *Bailey Specialized Buildings, Inc.* v. *United States*, Ct. Cl. No. 90-67, decided December 13, 1968.

The contract, itself, prohibits termination for default by the Government under the circumstances of this case, except for the convenience of the Government. Paragraph 5 of the contract provides:

> 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS
>
> * * * * *
>
> (c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, * * *, *acts of the Government, in either its sovereign or contractual capacity*, * * *, and unusually severe weather, * * *. [Emphasis supplied.]

The technical default of the contractor aforesaid was not one that required the Government to terminate the contract. *Schlesinger* v. *United States*, *supra* at 581. Paragraph 5(a) of the contract says that in case of default by the contractor, the Government *may* terminate the contract, but there is nothing that requires it to do so. In fact, subdivision (b) of the same paragraph describes what shall be done if the Government does *not* terminate the contract for default of the contractor.[5]

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[5] 5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, and for liquidated damages for delay, as fixed in the specifications or accompanying papers, until such

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The Board decided that the contractor was in default and that in threatening to terminate the contract for default, the contracting officer was threatening to do only what he had a right to do. We agree in part and disagree in part with this decision. These are questions of law and we are not bound by the decision of the Board with respect to them. *T. C. Bateson Constr. Co.* v. *United States*, 162 Ct. Cl. 145, 187, 319 F. 2d 135, 160 (1963). We agree that the Board correctly decided that the contractor was in default on November 16, 1961, because the completion date of the contract (October 28, 1961) had passed, but this was only a technical default for which the contractor was not responsible and which was in fact caused by the Government. We do not agree that in threatening to terminate the contract for default, the contracting officer was doing only what he had a right to do. In making this threat, the contracting officer undoubtedly meant, and the plaintiff undoubtedly understood, that the termination would be a true default termination in which the plaintiff would receive nothing, not one that would be converted into a termination for convenience. We hold that under the circumstances of this case, the contracting officer had no right to terminate the contract, except for the convenience of the Government, and when he threatened to do so to force the plaintiff to sign the supplemental agreement, he was guilty of coercion and duress against the contractor. Whether or not duress exists in a particular case, depends on the facts in the case. We said in the case of *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953):

> The law of duress has broadened somewhat during recent years making it virtually impossible to arrive at

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reasonable time as may be required for the final completion of the work, or if liquidated damages are not so fixed, any actual damages occasioned by such delay. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

(b) If the Government does not terminate the right of the Contractor to proceed, as provided in paragraph (a) hereof, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay.

> any clear-cut definition, and the courts have stated that its application must of necessity depend upon the circumstances of each individual case. *Morrill* v. *Amoskeag Sav. Bank*, 9 Atl. 2d (N.H.) 519, 524. An examination of the cases, however, makes it clear that three elements are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 301; *French* v. *Schoemaker*, 14 Wall. (U.S.) 314, 332. In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities. * * *

We think the three elements common to the duress cases quoted above are present in the instant case.

The Board found that no duress existed, citing *DuPuy* v. *United States*, 67 Ct. Cl. 348, 381 (1929) for the proposition that in order to constitute duress there must be something present other than threatened financial disaster. While it is true that the court in that case indicated by dicta that the fact that a contractor is in a bad financial condition for which the Government is in no way responsible, at the time an agreement is signed, is not enough to constitute duress, this is not the situation here. The Board cites *Commonwealth Engineering Co. of Ohio* v. *United States*, 148 Ct. Cl. 330, 180 F. Supp. 396 (1969), *cert. denied*, 364 U.S. 820, in support of its holding "where the contracting officer threatens default termination, and the contractor is actually in default, the contracting officer was threatening to do only what he had a right to do. This is not duress." It is at once apparent that this is not the situation here. The cases cited by the Board are clearly distinguishable from our case and are not controlling. We are not bound by this decision of the Board on questions of law.

On the question of duress, the instant case is governed by the principles announced in the decisions in *Aircraft As-*

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sociates & Mfg. Co. v. *United States*, 174 Ct. Cl. 886, 357 F. 2d 378 (1966); *James Shewan & Sons, Inc.* v. *United States*, 73 Ct. Cl. 49 (1931); *Universal Sportswear, Inc.* v. *United States*, 145 Ct. Cl. 209, 180 F. Supp 391 (1959); *Struck Constr. Co.* v. *United States*, 96 Ct. Cl. 186 (1942), and similar cases.

In *Aircraft Associates & Mfg. Co.* v. *United States*, *supra*, the plaintiff bid on the purchase of a number of discarded airplanes from the Government for the purpose of salvaging aluminum from them. After plaintiff made its bid and before the planes were delivered to it as the successful bidder, the Government removed large quantities of aluminum parts from the planes. When the plaintiff learned of this and complained, the contracting officer refused to allow the plaintiff to continue with the contract, locked the gates to the air base to keep plaintiff's workmen out, and threatened to terminate the contract for default unless plaintiff signed an agreement releasing his claims for the missing parts. At that point, the plaintiff was behind in its payments to the Government, because the Government had denied it access to the planes, so that it was unable to sell the parts it had salvaged, and, accordingly, it was in technical default through no fault of its own. In this situation, the plaintiff signed the release, finished the contract, and then sued the Government for the value of the missing parts, contending that it signed the release because of duress and coercion by the Government. We held that the facts showed that the contracting officer was guilty of duress and coercion, and we entered judgment for the plaintiff saying:

> When all of the facts recited above are coupled with the exclusion of plaintiff and its workmen from the base and the deprivation of the only opportunity plaintiff had to repay its obligation to the Government, we conclude that the release was obtained by the kind of duress which renders the release invalid and not binding upon the plaintiff. *James Shewan & Sons* v. *United States*, 73 Ct. Cl. 49 (1931) and *Struck Construction Company* v. *United States*, 96 Ct. Cl. 186 (1942). As the court stated in the *Shewan* case at page 93:
>
> > In cases of this kind the defendant should not be permitted to take advantage of its own failure to

> perform a solemn contract obligation in order to exact from the other parties to the contract a surrender of rights which he would not otherwise be compelled to give up.

In that decision the court pointed out that settlements and payments exacted by officials of the Government without lawful authority and in arbitrary fashion to which parties have yielded to escape financial disaster have been set aside on numerous occasions by the Supreme Court. Thus, in *Robertson* v. *Frank Brothers Co.*, 132 U.S. 17, 23 (1889), the Supreme Court stated:

> When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each. *Id.* at 898.

The contractor was awarded a contract by the Government in the case of *James Shewan & Sons, Inc.* v. *United States*, *supra*, to repair and dry-dock ships belonging to the Government. The contract specified that the contractor would be paid monthly, but the Government did not make the payments on time and many of them were long overdue. The Government suddenly terminated the contract while the work was in progress. A year and seven months later, the Government offered to pay the contractor $850,427.10 on the long overdue bills, on condition that the contractor sign a full release of all other claims. The contractor protested because the amount offered was far below what it was entitled to receive. Much of the amount due was for actual outlay of labor and materials on the part of the contractor, all of which was known to the Government. There was at least $250,000 in pending claims over and above the amount the Government offered. The contractor owed the bank and its income tax, which it could have paid but for the delinquency of the Government. Also, the Government threatened to turn the money appropriated by Congress for this work back to the Treasury if the contractor did not sign the release, which would require the contractor to procure the passage of a special act of Congress for it to get its money. In this situation, and faced with these threats, the contractor signed the release under protest. It

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later sued for the balance of the money due it. We held that the release was procured by duress and awarded the plaintiff a judgment. We said in that case:

> * * * The rule as to duress, indicated by the trend of authorities, has receded from its ancient strictness and has been accepted in numerous instances wherein it appeared that the parties were not on equal terms and no alternative existed except to submit to an illegal exaction or suffer irreparable injury to business.
>
> The Supreme Court in *Swift Company* v. *United States*, 111 U.S. 22, 28–29, a case involving an illegal exaction by officials of the Internal Revenue Department, used this significant language:
>
> "The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a *voluntary act* within the meaning of the maximim, *volenti non fit injuria*." *Id.* at 83–84.
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> * * * * *
>
> * * * The contract provided that the Navy Department should pay for the work done within thirty days. The defendant did not comply with this provision and it was only because of this, which resulted in the plaintiff being faced with financial disaster and irreparable loss, that the defendant was able by its failure to fulfill its agreement to exact from the plaintiff an unconscionable release of all claims regardless of their merit. But for the failure of the defendent to fulfill its definite and clear promises under the contract, plaintiff could very well have refused to sign the release. In cases of this kind the defendant should not be permitted to take advantage of its own failure to perform a solemn contract obligation in order to exact from the other parties to the contract a surrender of rights which he would not otherwise be compelled to give up. *Id.* at 93.
>
> * * * * *
>
> * * * It was the department's duty under the contract to make final payments for work performed when the work was completed on each vessel designated and take a release as to that vessel, and if the department had exhibited the same degree of zeal in making settlements, as the contract required, as it did exhibit in procuring the final release involved, this plaintiff would not have been

> brought to the brink of bankruptcy and compelled by a chain of circumstances, not of its own making, to do what it did. *Id.* at 95.

We hold that the facts in the instant case show that the plaintiff signed the supplemental agreement because of the duress and coercion on the part of the Government. Consequently, the agreement is not binding on the plaintiff.

We conclude that the rights of the parties must be determined without regard to the supplemental agreement. This being true, the Suspension of Work clause (paragraph SP 1–12) of the contract becomes important.[8] This clause provides that the contractor shall be entitled to an equitable adjustment in the contract price if a suspension is for an unreasonable length of time not due to the fault or negligence of the contractor and causes additional expense or loss to the contractor. It is our opinion that under the facts and circumstances of this case the delay was for an unreasonable length of time, was not due to the fault or negligence of the contractor, was for the convenience of the Government, and caused additional expense or loss to the contractor. All of the prerequisites for the issuance of a suspension of work order by the contracting officer were present. We think it should have been issued.

The situation here is much like that in the case of *T. C. Bateson Constr. Co.* v. *United States*, *supra*. There the Government delayed the contractor 38 days by causing a strike when it required the contractor to use non-union employees. The contractor sued for delay damages, claiming that the Government should have issued a suspension of work order and made an equitable adjustment of the contract price. We said in that case:

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[8] SP 1-12 SUSPENSION OF WORK

The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time, causing additional expense or loss, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly.

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> In this posture of the case, our opinion is that the provisions of Article GC–11 [suspension of work clause] are brought into operation. The Government's action demonstrates that, knowing all the consequences, its determination to use civil service employees which caused the strike could only be for the convenience of the Government. Under these circumstances, when it did cause delay and additional expense and since it was not the fault of the contractor, we think the contracting officer should have suspended the work and an equitable adjustment of the contract price should have been made under Article GC–11. Failing in this, we think the Government is liable. *Id.* at 187.

We reach the same conclusion here that we did in that case. The contracting officer should have issued a suspension of work order and made an equitable adjustment of the contract price with the contractor. Since this was not done, the Government is liable.

The liability of the Government here where no suspension of work was issued, but should have been, is the same as it would have been if it had been issued. A case that illustrates the latter situation is the case of *Morrison-Knudsen Co.* v. *United States*, 184 Ct. Cl. 661, 397 F. 2d 826 (1968). That case, like the one before us, involved a contract for work on a project in Alaska. The contractor was required to do the grading, drainage, and related construction work on a 45 mile segment of an existing roadway. The contract required the work to be completed by November 15, 1954, before the onset of severe winter weather in that part of Alaska. During the progress of the work, the Government made various changes in the contract which delayed the contractor. On October 26, 1954, the Government issued a suspension of work order on the project until further notice because of severe weather conditions which had frozen the subgrade and had produced six inches of snow on the roadway. The work was resumed the following spring and finished in about three weeks. The contractor contended that he could have completed the contract on time if the Government had not delayed him. He sued for damages resulting from the delay and suspension of work. We held in that case:

> * * * Completion of the contract having thus been delayed through fault of the defendant, it is liable for

damages incurred by plaintiff as a result of prolongation of the work into the 1955 construction season. See *e.g.*, *Jefferson Construction Co.* v. *United States*, 183 Ct. Cl. 720, 392 F. 2d 1006 (1968); *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 94, 69 F. Supp. 409, 411 (1947); *Donald M. Drake Co.* v. *United States*, 153 Ct. Cl. 433, 440 (1961); Speck, *Delays-Damages on Government Contracts*, 26 G.W.L. Rev. 505, 518 et seq. (1958). *Id.* at 706–07.

We think these principles are applicable to the case before us even though the Government did not stop the work of the contractor by a suspension of work order as authorized by the contract. It accomplished the same purpose for its own convenience by forcing the contractor to agree to the supplemental agreement by the coercion and duress discussed above. The plaintiff is entitled to recover whatever damages it suffered by reason of such delay.

We come now to consider the question of equitable adjustment or damages claimed by the contractor. It has presented its claim on the basis of the total cost theory.[7] In this connection, it shows that it spent $79,905.22 more than the original contract price of $487,775 because of the delay aforesaid. It contends that it is entitled to recover this amount, plus overhead and profit, on the original contract price, as well as on the additional costs, plus the cost of its bond and taxes, all in the total sum of $239,316.98 over and above the original contract price of $487,775. The defendant admits that an Air Force audit shows that plaintiff spent $79,905.22 more than the contract price of $487,775, but says these are only total cost figures and denies that plaintiff is entitled to recover that much even if it is entitled to a recovery in some amount. It points out that the Board made no determination as to the amount of plaintiff's damages and that under the Wunderlich Act, damages must be found in the first instance by the Board. We agree with the defendant. The amount of an equitable adjustment is a pure question of fact. *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56, 61 (1942). The total cost theory has never been favored by this court if there is any other way to determine the amount of the equitable ad-

[7] See Rubin, *The Total Cost Method of Computing An Equitable Adjustment-An Analysis*, 26 Fed. B.J. 303 (1966).

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justment. We said in *Phillips Constr. Co.* v. *United States*, 184 Ct. Cl. 249, 394 F. 2d 834 (1968):

> * * * [T]his method is not preferred by the court and will be used only in an extreme case. The reasons for its reluctance to apply the total cost approach are explained by the court in a much-quoted excerpt from its opinion in *F. H. McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955). The court said:
>
> This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means.
>
> Our opinion in *Great Lakes Dredge & Dock Co.* v. *United States*, *supra*, [119 Ct. Cl. 504, 96 F. Supp. 923 (1951), *cert. denied*, 342 U.S. 953 (1952)] was not intended to give approval to this method of proving damage, except in an extreme case and under proper safeguards. 131 Ct. Cl. 511, 130 F. Supp. 400. *Id.* at 260–61.

Again, we held in *WRB Corporation* v. *United States*, 183 Ct. Cl. 409 (1968):

> For claims 22 and 26, plaintiff's submission is the "total cost" standard (the difference between actual expenses and bid or estimated costs). This theory has never been favored by the court and has been tolerated only when no other mode was available and when the reliability of the supporting evidence was fully substantiated. See *Turnbull, Inc.* v. *United States*, 180 Ct. Cl. 1010 1025–26, 389 F. 2d 1007, 1015 (1967); *J. D. Hedin Construction Co.* v. *United States*, 171 Ct. Cl. 70, 86–87, 347 F. 2d 235, 246–47 (1965); *River Construction Corp.* v. *United States*, *supra*, 159 Ct. Cl. at pages 270–71; *Oliver-Finnie Co.* v. *United States*, 150 Ct. Cl. 189, 200, 279 F. 2d 498, 505–06 (1960); *F. H. McGraw & Co.* v. *United States*, 131 Ct. Cl. 501, 510–12, 130 F. Supp. 394, 399–400 (1955). The acceptability of the method hinges on proof that (1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses. See *J. D. Hedin Construction Co.* v. *United States*, *supra*, 171 Ct. Cl. at pages 86–87, 347 F. 2d at pages 246–47; *Oliver-Finnie Co.* v. *United*

States, *supra*, 150 Ct. Cl. at pages 197, 200, 279 F. 2d at pages 505–06; *F. H. McGraw & Co.* v. *United States*, *supra*, 131 Ct. Cl. at page 511, 130 F. Supp. at page 400. *Id.* at 426.

It is clear that we cannot make initial findings of fact on the amount of plaintiff's recovery. The case must be returned to the Board so that it may make this determination. *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 430–31 (1966).

Accordingly, we hold that plaintiff is entitled to recover on its claim for delay damages and judgment is entered for plaintiff thereon, and to that extent its motion for summary judgment is granted, the amount of recovery to be determined in the first instance by the Armed Services Board of Contract Appeals. Proceedings in the case in this court are hereby suspended for a period of 120 days from this date for such Board determination, and the case is returned to the Board for this purpose. The plaintiff will comply with Rule 100 and the appropriate provisions of the General Order of the court of April 1, 1968, implementing it. Upon the conclusion of the proceedings of the Board, the plaintiff will report the result to the court and the parties will take further action for the final disposition of the case in this court. The motion for summary judgment of defendant is denied.

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

ASBCA No. 9831

Appeal of

URBAN PLUMBING AND HEATING CO.

Under Contract No. AF 65(503)-1505

Appearances for the Appellant: Warde H. Erwin, Esq., Portland, Oregon.
Appearances for the Respondent: Colonel David C. Yeoman, USAF, Chief Trial Attorney, Major Eugene M. Solimine, USAF Trial Attorney.

OPINION BY MR. ANDREWS

The appellant contends that its work was delayed, extended, and interfered with as the result of the respondent's tardy review of submittals and improper rejection of equipment offered under the contract. The claim is in the amount of $239,316.90, which is computed by adding to its total direct costs of performance, assumed percentage mark-ups for overhead, profit, bond premiums, and Alaska business tax, and subtracting therefrom the contract price.

Findings of Fact

1. The contract was awarded to the appellant on 23 June 1961 for modification of the central heating and power plant at Eielson Air Force Base, Alaska,

at a price of $485,704.00. It specified that the respondent must issue the notice to proceed by 30 June 1961, and appellant must complete the work within 120 calendar days thereafter. The notice to proceed was actually issued on 30 June 1961, thus fixing the completion date as 28 October 1961.

2. There were several major features of the work. A system was to be installed whereby outside air could be taken into the power plant and heated as combustion air for the boilers. A new handling system was to be installed for removal of ashes from the boilers. A concrete floor, new heaters, and other miscellaneous work was to be performed in the coal thaw shed adjacent to the powerhouse. A centralized vacuum cleaning system was to be installed in the powerhouse. And finally new coal handling equipment was to be installed to modify the existing system.

3. This plant furnished most of the heat and electricity for the operations buildings and quarters at Eielson AFB. Some of the installation work would require that operation of portions of the plant's equipment be shut down. Obviously operation of the plant could not be completely stopped, and the specifications provided as follows:

> 1-04 COORDINATION WITH USING AGENCY: The Contractor shall execute all work with a minimum of interference with the using agency. Any work which will cause a disruption of normal operations of facilities will first be cleared in writing with the Contracting Officer or his authorized representative.
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> * * * * * * *
>
> 1-06 INSPECTION OF SITE: The Contractor shall thoroughly examine the site prior to submitting a bid and become thoroughly familiar with all conditions that might affect the cost of the project. The Contractor shall also notify the Contracting Officer of any discrepancies be-

tween the contract drawings and actual field conditions.

* * * * * * *

1–09 INTERFERENCES: The Contractor shall store all materials and schedule all work so as to provide a minimum of interference to the normal operations of the Power Plant.

In extremely cold winter weather it became necessary to place into operation 5 of the 6 boilers in the powerhouse, and to hold the remaining one on standby. Thus, that part of the work which required the cessation (of a part) of the plant's operation could not be accomplished at all in winter. The short performance period was designed to assure completion before the onset of winter weather.

4. Appellant was required to make a site inspection prior to bidding and did so. It thus, presumably, became familiar with the powerplant and the nature of the work.

5. The specifications directed that the contractor submit to the contracting officer, for his approval, a listing of the equipment to be furnished, and such descriptive information as would permit a review to determine whether or not such equipment met the requirements of the specifications. Such submittal was required within 10 days of contract award on the coal handling and ash removal equipments and within 30 days after award for the ash removal equipment. While there were numerous items of equipment to be supplied, those involved in this appeal were the coal scales, the combustion air coils, and the ash removal equipment. Some drawings on these equipments were delivered on 5 or 6 July 1961. Formal submittals were made to the contracting officer on 11 July and 13 July 1961. The respondent made no immediate review of these submittals, for it had not been decided whether such review would be made by the architect-

engineer (hereinafter AE) or by the Base Civil Engineer.

6. Section 5 of the specifications described the coal handling equipment. Relevant portions are as follows:

5–04 MATERIAL AND EQUIPMENT SCHEDULE:

A. As soon as practicable and within 10 days after the date of award of contract and before commencement of installation of any materials or equipment, a complete schedule of the materials and equipment proposed for installation shall be submitted for approval. This schedule shall include catalogs, cuts, diagrams, drawings, and such other descriptive data as may be required. In the event any items of materials or equipment contained in the schedule fail to comply with the specifications or the requirements of the drawings, such items will be rejected. In case of rejection, similar data on other materials or equipment shall be immediately submitted until they shall comply with the requirements. *No extension of contract time will result from submission of material and equipment data which does not fulfill the requirements.* [Emphasis supplied]

B. The manufacturer's drawings shall be reviewed to determine that the equipment to be furnished will fit into the available space and will cause no structural interference. * * *

* * * * * * *

5–06 EXISTING SYSTEMS:

A. *Coal Bunker to Boiler:* The existing coal bunker to boiler system conveys coal through the coal bunkers to the stoker feeder hoppers through a three-way gate valve at the discharge of the coal bunkers, thence through a chute into a circular downspout and into conical spreaders on Boilers 1, 2, 3, & 4. On Boilers 5 & 6, the three-way gate valve discharges through a chute into coal scales at elevation 581'-2", from which the working parts have been removed.

The discharge from the coal scales drops into rectangular spreaders to the stoker feeder hoppers. The existing three-way gate valves are designed to direct coal either to the chutes leading to the spreaders or to an under-bunker conveyor which has been partially removed.

* * * * * * *

5–09 DESCRIPTION & CAPACITY OF NEW EQUIPMENT:

D. *Coal Scale:*

The coal scale shall be of the stationary, automatic, dust-proof, batch type, Model 46, manufactured by Stock Equipment Company, or approved equal. Scale shall have a rated capacity of 10 tons per hour and a hopper capacity of 200 pounds. Distance between center line of inlet and center line of outlet is to be 2′-8″.

1. The coal scale shall be a complete unit including the body, belt feeder, feeder drive, bypass, weighing mechanism, weigh hopper, controls, counter, circuit breaker, control transformer and all other items requied to make a completely automatic coal scale.

The remaining portions of paragraph 5–09 give a fairly detailed listing of the mechanical requirements of the coal scales.

7. The coal scales offered by appellant were a standard model manufactured by Richardson Scale Company. From its own correspondence, Richardson is the largest manufacturer of such equipment in the country. The evidence is uncontradicted that this firm enjoys an excellent reputation and its products are of good quality. Admittedly, however, the equipment offered did not meet many of the required mechanical features set out in the specifications, which actually described the "brand name" Stock Equipment Company scales in considerable detail. We mention only a few of the differences which the AE considered important.

a. Richardson scales had been installed on boilers 5 and 6 when these boilers had been added to the powerhouse. It was found that the configuration of the Richardson scales was not compatible with the location of the boilers. The firing aisle in this power plant is unusually wide, while in the Richardson equipment the distance from the bottom of the coal hoppers to the scale itself is relatively short. As the result, the chute does not have sufficient slope so that the coal would flow through it by gravity. The working parts had been removed from the scales on boilers 5 and 6, as stated in paragraph 5-06, quoted above, and these scales were to be replaced as a part of the contract work.

b. The specifications contained a requirement for an endless rubber feed belt without splice. The Richardson equipment contained a laced belt. The nearest belt lacers to Fairbanks, Alaska, are in Seattle, Washington. An untenable delay could be encountered in the event a belt broke.

c. A solenoid counter was specified while the Richardson equipment offered a mechanical counter.

8. Relevant provisions of Section 7 of the specifications, describing the combustion air system are as follows:

> 7-02 GENERAL: The applicable drawings indicate the extent and general arrangement of the installation. If any departures from these drawings are deemed necessary by the Contractor, details of such departures and the reasons therefor shall be submitted as soon as practicable to the Contracting Officer for approval. No such departures shall be made without the prior written approval of the Contracting Officer.
>
> A. *Standard Products:* The equipment to be furnished under this specification shall be essentially the standard product of the manu-

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facturer. Where two or more units of the same class of equipment are required, these units shall be products of a single manufacturer; however, the component parts of the system need not be the products of the same manufacturer.

B. *Material and Equipment Schedule:* As soon as practicable and within 30 days after the date of award of contract and before commencement of installation of any materials and equipment, a complete schedule of the materials and equipment proposed for installation shall be submitted for approval of the Contracting Officer. * * * Equipment differing from that specified may be proposed, provided the Contractor clearly states such differences and provided all essential requirements of the specification are met. If the equipment offered under this provision is, in the opinion of the Contracting Officer, equal or better than that specified, it will be given consideration. * * *

* * * * *

D. *Manufacturer:* Mechanical equipment to be furnished under this specification shall be the product of a reputable manufacturer who shall have had not less than five years experience in the design and construction of equipment for the purpose and service intended for this system and of a capacity equal or greater than specified which shall have been proven in successful operation for at least five years, under like or more severe conditions. Required accessories shall also be of proven design and the product of experienced and reputable manufacturers.

In addition paragraph 7-07 of the specifications gives many required mechanical features of the combustion air coils. While no brand name is given, it appears from the testimony that combustion air coils manufactured by L. J. Wing Co. was used as a model in writing the specifications. Appellant's proposal offered

Pace combustion air coils to be furnished by Brod and McClung. These coils differed from the specification requirements in a number of particulars; notably, the coils would have steel tubing while non-ferrous metal was specified, and the connection to the headers was different from that specified. No proof was furnished that the manufacturer of this equipment had the experience qualifications detailed in specification paragraph 7-02D.

9. Section 8 of the specifications describes the ash removal equipment, in relevant part as follows:

> 8-04 GENERAL: The contract drawings indicate the extent and general arrangement of ash removal equipment to be replaced. It is the intent of these specifications and drawings to obtain an ash conveyor installation which will eliminate the excessive maintenance and poor operational functions of the system now being used on Boilers 1, 2, 3, and 4. The newer system used on Boilers 5 and 6 is quite satisfactory from a maintenance and operational standpoint. It has therefore been decided to extend the system used on Boilers 5 and 6 to Boilers 1 thru 4, and replace the ash handling equipment on these boilers.
>
> It is the intent of the drawings and specifications that equipment for this contract shall be as manufactured by the United Conveyor Corporation, or approved equal. If any departure from the contract drawings are deemed necessary by the Contractor, details of such departures and the reasons therefor shall be submitted as soon as practicable to the Contracting Officer for approval. No such departures shall be made without the written approval of the Contracting Officer.
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> * * * * * * *
>
> B. *Standard Products:* The equipment furnished under this section of the specifications shall be essentially the standard products of

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manufacturers regularly engaged in the production of these types of equipment and shall be the types, sizes, and capacities and for the kinds of service specified. Each item of equipment shall be of the most recent type which has been proven in successful commercial operation for at least three (3) years without major changes in design. The air washers and receivers and other items of equipment where two or more units of the same class are required, shall be products of the same manufacturer; however, the component parts of the equipment need not be the products of the same manufacturer.

C. *Manufacturer's Lists, Drawings & References:* Within ten (10) days after award of contract, the Contractor shall submit to the Contracting Officer for approval a tabular list, in triplicate, of all the different individual items, listing opposite each item the manufacturer's name, address, and identifying number together with any drawings or specifications pertinent to the equipment selected. Within thirty (30) days after award of contract, the Contractor shall submit detailed drawings showing equipment location, foundation details, and connections to existing ash conveying piping, to the Contracting Officer for approval. Further, the Contractor shall submit to the Contracting Officer the addresses of five installations of comparable size with air washers operating under vacuum in conjunction with mechanical exhausters where the manufacturer of the major items of equipment selected (blowers, air washers, receiver) has furnished similar-designed equipment with satisfactory performance. No materials of an untried nature will be acceptable.

There followed detailed mechanical requirements for the equipment.

10. The ash removal equipment proposed by the appellant was to be manufactured by the Durabilt

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Conveying Systems Division of Chicago Fire Brick Company. No proof was offered that this equipment met the experience requirements of the contract. In addition, the AE reported to the contracting officer a variation from the mechanical requirements of the specifications, by letter of 29 August 1961, as follows:

> 4. The equipment presented does not include a weighted, nonvibrating relief valve to provide pressure control, plus overload protection for the blower as required under Specification Section 8–06A(1) entitled Equipment Design.
>
> 5. Equipment submittal arrangement of the Durabilt drawings No's. AHE–3–593–2 and AHE–3–593–3 indicate the blower motor assembly foundation as 4½″ high to accomodate [sic] the air washer top outlet. The contract drawings specifically show on sheet 38 of 42 a foundation three feet high.
>
> 6. Specification Section 8–06B, Equipment Design, specifically calls for an air washer of the impact type capable of successfully operating under full 14″ Hg vacuum with satisfactory water operation. The air washer submittal is of the centrifugal type which does not meet the specifications. The above data is shown on submittal drawing No. AHA–1–5983.
>
> 7. Specification Section 8–06C, Equipment Design, indicates the receiver and secondary separator be constructed of not less than ¾″ thick hard alloy cast plate with 2″ thick wear plates. Drawing AHA–1–5299 does not indicate this requirement, nor does this submittal indicate utilization of existing openings and anchor bolts after removal of existing equipment is possible.
>
> Drawing No. AHA–3–513 by Durabilt does not show a swing gate nor a removable wear plate as called for under this section of the specifications.

8. Durabilt Drawing No. AHE–1–593 does not satisfactory indicate the wear and abrasive resistant pipe required at each change indirection as called for under Section 8–06G.

9. Durabilt Drawing No. AHA–2–5993, Rotary Slide Gate, does not show or indicate dust seal rings as called for under Specification Section 8–061.

10. Durabilt Drawing No. SK–5757 indicates plain end ash pipe will be utilized, however location of such ash line is not shown on the drawings.

11. Pressure and temperature rating of the 8" steam exhauster shown on Durabilt Drawing No. AHA–1–507 is not shown.

In addition to the above, no information is provided for vacuum cleaning system interlock fly ash conveyor control, exhauster interlock, control panel, and other equipment details.

The above basic factors are in direct conflict with the detailed specifications either by non-availability of information, or equipment that does not meet the specified equipment design. This establishes that the submittal presented is unacceptable.

That such variations did exist is not controverted in the record.

11. Following the submittal of the data on this equipment, one of appellant's engineers traveled to Fairbanks where, on 17 July 1961, he conferred with the AE and the contracting officer. While the AE had not actually yet been retained to review the proposals, he informed appellant's engineers that he would not approve the Brod and McClung Combustion Air Coils or the Richardson Scales, and that the information submitted on the Durabilt Ash Removal Equipment was not in sufficient detail to permit review. Testimony is conflicting as to actually what was said at the

meeting. In any event appellant's engineer gained the impression that only Stock Scales, Wing Coils, and United Conveyor Ash Removal Equipment would be approved. On the same day as the conference, he wrote a memorandum to his purchasing department to cancel the orders which had been placed for the offered equipment and to place orders for that named last above. Appellant did send cancellation notices to the suppliers of rejected equipment on 19 July 1961.

12. Upon receipt of the notice of cancellation, Brod and McClung discussed their equipment with the AE, agreed that it did not meet the requirements of the specifications, and accepted the cancellation. While appellant did not receive formal rejection of the Brod and McClung Coils until 7 August 1961, the informal rejection was effective. Appellant actually ordered the Wing Combustion Coils immediately after the 17 July meeting. The order was confirmed by the jobber, on 26 July 1961, with the statement that the three weeks delay in placing the order resulted in a promised shipping date of 11 September 1961.

13. Richardson refused to accept the cancellation of appellant's order for its scales. It insisted to both the appellant and the AE by telephone calls and letter of 24 July that, while its equipment did not meet the detailed requirements of the specifications, it was equal in utility to the "named brand," and demanded to know the reasons for the rejection. The AE forwarded a formal rejection of the Richardson Scales to the contracting officer on 26 July 1961. This was received by the appellant on 7 August 1961. In response to repeated arguments, the AE gave detailed reasons for rejection of this equipment in a letter of 17 August 1961.

14. Appellant had placed an order for Stock Equipment Company Scales on 20 July 1961. The order was

confirmed 25 July 1961, with tentative delivery in October. Delays resulted because of the arguments with Richardson, and incomplete data submission by Stock. Appellant received final approval of the shop drawings on 5 September 1961. The equipment was shipped on 3 December 1961 and arrived at the job site 18 January 1962.

15. Chicago Fire Brick Co. also initially refused to accept cancellation of appellant's order for the Durabilt ash handling equipment. The AE then advised appellant that he had not received any data on this equipment. Durabilt submitted such data to appellant on 4 August and it was received by the AE on 8 August 1961. It was disapproved by him on 29 August, for the reasons stated in finding 10, above.

16. Appellant placed an order for United Conveyor ash handling equipment on 29 July 1961 but, in view of the Chicago Fire Brick Co. protest, considered it wise to place a verbal stop on the order. United Conveyor Corporation submitted data on its equipment to appellant on 24 July 1961. This data was mailed to the contracting officer on 6 September and approved by the AE on 15 September 1961. All of this equipment, except the control panel, was shipped on 24 November 1961 and arrived at the job site 9 January 1962. The control panel was shipped 30 December 1961 and received 31 January 1962.

17. The specifications required that work be started and completed as established by a schedule of work prepared and approved by the contracting officer before any work was commenced. The progress schedule submitted and approved contemplated that work would first be started in the coal thaw shed, and that this part of the work would be completed by 31 August 1961. The operational parts of the shed consisted of railroad tracks on ties, surrounded by gravel,

running through the shed, and a crusher called a "grizzly" into which the coal was dumped. The coal was then conveyed from the grizzly into the powerhouse. Appellant was to remove the tracks, lay a concrete floor, and replace the tracks. Some concrete was to be replaced around the grizzly. A car puller was to be installed. Heaters were also to be installed.

18. The respondent considered this work to be urgent, for the shed in its existing condition was a severe safety hazard. A large part of the combustion air for the existing powerplant was drawn through open doors. As the outside temperature reached extreme cold of —30° and below, it became necessary to close the doors to prevent freezing of lines and instruments. The boilers then generated negative air pressure in the plant. Coal dust, which had permeated the gravel floor, was then drawn into the plant from the coal thaw shed and from the bunkers, creating a dangerous, explosive, condition. The concrete floor would permit the coal thaw shed to be kept clean.

19. In anticipation of the work, the respondent had placed a stockpile of coal by an outside crusher and conveyor. When appellant commenced work in the coal thaw shed, respondent stopped using it. The work in the coal thaw shed was not completed in accordance with the progress schedule. In fact the work, other than installation of heaters, was not completed until approximately 20 November 1961. The heaters were installed in the spring of 1962. The concrete work, and setting the rails in the coal thaw shed was completed the first week in October 1961, concurrently with arrival of the first deep snowfall. It was then necessary for the respondent to commence using the coal thaw shed to feed the boilers. The respondent confined its use of the shed to night hours as much as possible, but could not do so entirely because the

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heaters had not been installed. The respondent's use of the shed naturally interfered with appellant's work. When coal was hauled in and dumped only at night, appellant's workmen must put away their tools and materials so as not to obstruct the tracks. Cars standing in the shed reduced working space. Extra precautions in welding were necessary and a fire watch was required. When coal was being dumped and welding was in progress, the doors were opened to disperse coal dust and prevent explosion. The extreme cold then reduced efficiency.

20. The work was delayed about 3 days due to an error in elevations. No other delaying factor can be attributed to the respondent as preventing completion of work in the coal thaw shed within the scheduled time. A tractor did damage anchor bolts for the car puller, but the evidence shows they were in the wrong locations, thus could not have been used anyway.

21. On 7 September 1961 appellant requested 90 days time extension for delays in procuring the ash handling equipment. The contracting officer offered to extend the time 30 days by letter of 26 September. The appellant then, on 18 October 1961, requested 120 days time extension. The contracting officer, on 13 November 1961, replied that he would grant 69 days time extension for delay in approvals. This was apparently computed as the total lapsed time between the notice to proceed and appellant's receipt of the rejection of the Durabilt ash removal equipment. As an alternative the contracting officer offered a contract amendment which would delay the start and completion of certain items of the work, and establish the final completion date as 30 June 1962. The draft supplemental agreement contained the following:

> This Supplemental Agreement neither increases or [sic] decreases contract *costs*. [Emphasis supplied]

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This offer was motivated by the fact that the power plant could not be shut down for work in the winter, and the contemplated time extension would allow the appellant 120 days, equal to the entire contract performance time, after winter would be over.

22. Appellant's Alaska Representative met with the contracting officer on 16 November. The appellant was given the alternatives of accepting the 69 days time extension, signing the proposed modification, or having the contract terminated for default. The 69 days would have been useless and, from appellant's viewpoint, default termination was unthinkable. Appellant objected to the statement in the draft agreement that there would be no change in costs. Its representatives knew extra costs would be incurred by extending the performance period. The local representative contacted one of appellant's principal officers and was told to sign the agreement provided the word "costs" be changed to "price." The parties then signed Supplemental Agreement No. 1, which reads in substantial part as follows:

> The above-numbered contract is modified as follows:
>
> Pursuant to Clause 5 entitled "Time Extension"
>
> 1. By extending performance period as follows:
>
> (a) Coal thaw area heating system extended to 20 November 1961, except for insulation of pipe to be completed by 27 November and painting to be completed prior to 30 June 1962.
>
> (b) Combustion air system modification and ash removal equipment and auxiliaries shall be completed by 15 May 1962 and prior to installation and modification of coal scales.
>
> (c) Installation and modification of coal scales shall be completed 45 days after completion of the combustion air system modification

and ash removal equipment and auxiliaries but not started prior to 15 May 1962.

(d) All other work not mentioned above shall be completed by 30 June 1962.

The above extension of time is granted due to adverse weather conditions and Government delay in approval of data.

This Supplemental Agreement neither increases or [sic] decreases contract price.

Except as hereby modified, all terms and conditions of said contract as heretofore modified remain unchanged and in full force and effect. This Supplemental Agreement is entered into pursuant to the authority of basic contract.

23. Appellant continued to work through the winter, with attendant problems. There were interferences from the severe weather and the operation of the powerhouse. While there was some rearrangement of the interim schedules, the work was substantially completed on 30 June 1962.

24. An audit conducted by the Air Force after completion shows a cost to the appellant of $567,680.22. This is $79,905.22 in excess of the final contract price.

25. The original claims consisted of the allegations of delay and interference detailed in the foregoing findings, and several smaller claims founded on particular alleged changes. Several of the smaller claims were abandoned at the hearing, and none of the others were supported by adequate proof to warrant specific findings.

Opinion

The first question presented is whether or not the coal scales, combustion air coils, and ash removal equipment initially offered by the appellant was improperly rejected by the respondent. Appellant argues

that this equipment met the "intent" if not the detailed requirements of the specifications. It says that the details of fabrication and operation given were unduly restrictive and in violation of the provisions of the Armed Services Procurement Regulation relating to description by "brand name or equal." It says that respondent would accept only the named brands, thus should have specified them alone. We can assume that every allegation made by the appellant is correct, but still find that the equipment was properly rejected.

Prior to award of a contract, prospective bidders, suppliers, or even interested taxpayers may object to restrictive specifications which unnecessarily restrict competition. These objections may be, and frequently are, made to the contracting officer, his superiors, or to the General Accounting Office. When the restrictions are found to be more stringent than the needs of the service dictate, the specifications are amended. But a bidder may not remain silent during the bidding period, then after receipt of award of the contract contend that he has the right to furnish something less expensive and not meeting the requirements of the specifications. To allow such would be equally damaging to the competitive bidding system with unduly restrictive specifications. Many of the specified details may have been unnecessary. Others were clearly desirable for this particular application, and some of these details were not met by the offered equipment. The Richardson Scales, Brod and McClung Coils and the Durabilt equipment clearly did not meet the requirements of the contract and were properly rejected.

The appellant was the innocent victim of represen-

tations by its prospective suppliers that their equipments would meet the specified requirements. We have no reason to believe they were not acting in good faith. But this would not entitle appellant to recover its losses from the Government. Under the most liberal view it could, at most, receive a time extension, and this the appellant got.

The respondent did unreasonably delay acting upon these submittals. The contract gave appellant only 10 days in which to make the submittals. The respondent should have had someone available at that time to review the data, but the AE was not retained to do this work until 18 days after the notice to proceed. He thereafter acted with reasonable promptness on the Richardson and Brod and McClung equipments, but there is no reasonable excuse for delaying official action on the Durabilt submittal until 29 August, particularly since it had already been decided to reject it.

Appellant argues that by insisting upon changing the word "costs" to the word "price" in Supplemental Agreement No. 1, it avoided agreeing that the contract consideration would not be increased as the result of the extended contract performance time. This is not a reasonable construction of the provision which states, "This Supplemental Agreement neither increases or [sic] decreases contract price." The other provisions of the agreement reschedule performance. We think it clear that the quoted sentence stated an agreement that the contract price would not be changed by reason of performance under the new schedule. The appellant's losses were directly attributable to such performance.

The appellant next contends that the supplemental agreement was without consideration, thus not bind-

ing upon it. The appellant was actually in default at the time the supplemental agreement was made. The parties were jointly responsible for the delay in delivery of the equipment, the appellant because it offered equipment which did not meet the contractual requirements, and the respondent because it delayed too long in rejecting it. We are unable to apportion the causes of delay for the evidence is directed toward the time lapse between submittal and action thereon. A time extension is properly computed upon how long the work is delayed, not how long the delaying causes continue in existence. We know when the approved equipment was delivered, but not when it would have been delivered but for the respondent's delay in rejecting the unsuitable equipment. In any event, the appellant was not entitled to a time extension adequate to permit completion of the work. The receipt of such time in the modification was a valuable consideration.

Appellant's final argument is that the supplemental agreement was signed by it under duress. In order to constitute economic duress, there must be something present other than threatened financial disaster. *DuPuy* v. *United States,* 67 Ct. Cl. 348, 381 (1929). Where the contracting officer threatens default termination, and the contractor is actually in default, the contracting officer was threatening to do only what he had the right to do. This is not duress. *Commonwealth Engineering Company of Ohio* v. *United States,* 48 Ct. Cl. 330 (1960), cert. denied 364 U.S. 820. In the instant case the appellant was in default for the completion date was 18 days past when the modification was signed. At least as to the coal thaw shed only 3 days of the delay was excusable. The contracting officer offered 69 days time extension because of the delay in approvals. This would not have permitted

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completion, but we cannot find that it was not as much as was due for excusable cause.

The appeal is denied.

Dated: 30 December 1966.

HARRIS J. ANDREWS, Jr.,
Member of Division No. 3,
Armed Services Board of Contract Appeals.

I concur.

HUGH B. ARCHER,
Acting Vice Chairman, Armed Services Board of Contract Appeals, and Member of Division No. 3.

ROBERT J. O'CONNOR,
Member of Division No. 3, Armed Services Board of Contract Appeals, did not participate.

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 9831

Appeal of

URBAN PLUMBING AND HEATING CO.

Under Contract No. AF 65(503)-1505

Appearances for the Appellant: Warde H. Erwin, Esq., Portland, Oregon.

Appearances for the Respondent: Colonel David C. Yeoman, USAF, Chief Trial Attorney; Major Eugene M. Solimine, USAF, Trial Attorney.

ON MOTION FOR RECONSIDERATION

The appellant has moved for rehearing and redetermination of certain of the Board's findings set out in

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its opinion of 30 December 1966, which denied the appeal.

The first allegation of error is that the member of the Board who conducted a portion of the hearing did not participate in the decision. This member retired soon after the hearing, and was not a member of the Board at the time this case was ready for decision. The Board has held many times that preparation of the opinion by a member who did not preside at the hearing is not error. *Buckeye Union Casualty Co.*, ASBCA No. 6770 (On Reconsideration), 1962 BCA P 3309, and cases cited therein. See also *Racine Screw Company* v. *United States*, 156 Ct. Cls. 256 (1962).

The remaining allegations of error present nothing which was not fully considered by the Board in reaching its decision.

The Motion for Reconsideration is denied.

Dated 8 February 1967.

HARRIS J. ANDREWS, JR.,
Member of Division No. 3,
Armed Services Board of Contract Appeals.

I concur:

HUGH B. ARCHER,
Acting Vice Chairman, Armed Services Board of Contract Appeals and Member of Division No. 3.

WILLIAM T. GRIFFITH,
Lt. Colonel, USAF, Member of Division No. 3, Armed Services Board of Contract Appeals, did not participate in the determination of this decision.

I certify that the foregoing is a true copy of the decision and opinion of the Armed Services Board of Contract Appeals in ASBCA No. 9831, Appeal of Urban Plumbing and Heating Co., On Motion for

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Reconsideration, rendered in conformance with the Board's Charter.

Dated

GEORGE L. HAWKES,
Recorder, Armed Services Board of Contract Appeals.

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No. 389

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In the Supreme Court of the United States

OCTOBER TERM, 1969

United States of America,

Petitioner,

v.

Urban Plumbing & Heating Co.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1969

United States of America, *Petitioner*,

v.

Urban Plumbing & Heating Co.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The respondent Urban Plumbing & Heating files its brief in opposition to the petition for Certiorari.

OPINION BELOW

The opinion of the Court of Claims is reproduced in the appendix to petitioner's brief and will not be reprinted.

JURISDICTION

The respondent disagrees with the statement of petitioner that this Court has certiorari jurisdiction [28 U.S.C. 1255(1)].

Section 28 U.S.C. 1255 (1) provides generally that this court may review opinions of the Court of Claims by certiorari.

Petitioner claims that the Court of Claims' decision is final (Pet. Br.) although admitting it is interlocutory at the same time (Pet. Br. 1, n. 1).

The petitioner's contention is that the remand by the Court of Claims to the Armed Services Board of Contract Appeals for a determination of the matter of damages is to be disregarded for the purpose of finality.

Respondent disagrees. The Court of Claims has retained complete jurisdiction of the case, and the Board has merely been directed to make a further finding. The element of damages may well be a very important matter to be ultimately disposed of, and if certiorari should be ultimately granted in this case, the damage element may well be a ground upon which respondent may itself seek certiorari if the Armed Services Board of Contract Appeals fails to make a proper finding, or if the Court of Claims should fail to enter a proper award.

In support of petitioner's claim for certiorari jurisdiction, petitioner cites three cases:

United States v. Caltex, Inc., 344 U.S. 149.

United States v. Central Eureka Mining Co., 357 U.S. 155.

United States v. Acme Process Equipment Co., 385 U.S. 138.

Each of those cases has been examined, and none appears to have any relevance to the point for which they are cited:

Caltex was a case where the army destroyed an oil refinery in the Philippine Island to keep it from falling into enemy hands. A direct action for compensation was brought in the Court of Claims, and this Court granted certiorari to consider the question of whether compensation was due under the constitution as a "taking of property."

Central Eureka was a case brought directly in the Court of Claims under a special statutory authority to review orders of the War Production Board irrespective of lapse of time, laches, or a period of limitation. The board had authorized closure of a gold-mining operation without taking the property or its equipment. This court granted certiorari because the Court of Claims placed a construction upon the statutory review authority to the effect that the legislaion was intended as a mandate to allow compensation. The Court of Claims' decision appeared to be final.

Acme Process was an original proceeding in the Court of Claims for damages for cancellation of a government contract. The defense was that the cancellation was motivated by a violation of the "antikickback" statute, and this court granted certiorari to review a Court of Claims' decision that the kickback statute did not authorize cancellation for such a violation under the facts of that case. The Court of Claims'

decision was final. The application of the three cases to the point for which they are cited is not apparent from reading of the reported decisions.

The decisions following appear to support a contrary conclusion:

Marconi Wireless Telegraph Co. of America v. *United States*, 320 U.S. 1.
American Construction Co. v. *Jacksonville T. & K. Ry. Co.*, 148 U.S. 372.
United States v. *Beatty*, 232 U.S. 463.
Heike v. *United States*, 217 U.S. 423.
Arnold v. *United States*, 263 U.S. 427.

CORRECTED STATEMENT

The statement of the case while correct in many details is incomplete or might be misleading.

The statement (Pet. Br. 3) that the completion date was important "because the contract work involved shutting down a portion of the base-heating plant which could not be done during the Alaskan winter" is misleading in that the contractor was not made aware of the fact that a portion of the plant could not be shut down during the winter; only the government knew of that fact.

For the first time, at the hearing before the Board did it first become known to the contractor that the base engineer refused to permit a shutdown of any portion of the plant. His decision, it was then discovered, was based upon a desire to have standby power and heat (Tr. 112) during the severe Alaskan winter.

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It is stated that the contract did provide that no time extension would be allowed for submission of material and equipment which did not fulfill the requirements (Pet. Br. 4). The statement is true, but that matter was not an issue in this case because while the respective manufacturers guaranteed that their respective products would "fulfill the requirements" (a fact stipulated to by one of the airforce attorneys immediately prior to the hearing after an appraisal of the situation by the government's own independently selected-engineer (Ex. 49 Portland)) equally as well or better than the named brand, the Board, the Court of Claims, and the contracting officer himself, each found that the delay was related to the failure to have someone available to approve or reject the products submitted (Pet. Br. App. 30 and 63), and was not related to a "failure of fulfillment of the requirements."

It is stated (Pet. Br. 4) that the architect-engineer advised orally that he would reject the coal scales and combustion air coils, if appointed.

This was, of course, not essential to the determination requested by the petition, but it might be misconstrued. The acual situation was that the government would not or did not make a determination whether or not the procurement office (to whom all submittals were made) would retain the function of "approval or rejection" of products submitted or would employ a third person (Tr. 450), and it was 38 days before they finally made that determination (Ex. A, Portland, Tr. 474).

It is true that the contractor promptly cancelled its orders with the proferred equipment manufacturers upon learning of the intended rejection *if the person making the remark was appointed as approval engineer* (incidentally, the engineer denied making any such (Tr. 477-9) remark). However, it is likewise apparent that the contractor could not place orders with any manufacturer "named or otherwise" until it had received the approval of the procurement office, and the government procurement officer so testified (Tr. 195).

He stated:

> "Normally, a contractor is taking a great risk to place orders and start production on supplies that have not been approved by the government since they may be upset, and that is part of government's claim."

As to the ash handling equipment rejection (Pet. Br. 5), the Board found that there was no reasonable excuse for failure to disapprove of the ash handling equipment until August 29 (Pet. Br. App. 63). No appeal was taken from that finding nor objection to it made by the government in the Court of Claims.

Reference to the 69 days (Pet. Br. 5) as being generous to the contractor is not an accurate statement of fact. As one example, it was admitted that 69 days arithmetical extension in a mid-Alaska winter is not equal to 69 days in midsummer (production schedule changes and many other factors were involved).

The board itself held that the extension of 69 days was inadequate and that cancellation would have been unthinkable. The government took no appeal from those findings nor ever made an objection thereto (Pet. Br. App. 32, 33).

The petitioner's statement (p. 7) states that the board's determination was based upon the ground that plaintiff's claim was barred by the supplemental agreement. The cited reference is a general reference to the board's opinion (Pet. Br. 7 and 45). The reason for the general citation to the entire opinion rather than to a particular part is that the board's opinion did not so state, although an inference of such a determination may be made.

There are other discrepancies, but it is felt that none is important enough to affect this court's determination of the petition for certiorari.

A simple summary of the case is: (1) that there was a short-term completion contract for modification of a heating plant in Alaska; (2) that in conformity with the contract, the contractor offered drawings for certain products for approval or disapproval; (3) the government did not, could not, or would not, determine whether or not to appoint an independent approval engineer; (4) that after 38 days' delay, it finally appointed such an engineer who according to both the Armed Services Board of Contract Appeals, and the Court of Claims unduly delayed in disapproval of some of the items submitted; (5) the contracting officer knew that an extension would be

necessary and learned privately that the base engineer would not permit completion in sequence because of the onset of the Alaskan winter and the necessity to maintain standby equipment; (6) it was privately determined within the government to force acceptance of an extension by an offering of an inadequate extension or in the alternative to demand the contractor perform over a total period of one year (365 days) under threat of cancellation.

The court found that under the special facts of this case, that this constituted duress and remanded the case to the board for a determination of damages.

REASONS FOR DENYING THE WRIT

Basically, the government's argument is that the Court of Claims has extended the legal concept of duress and has thereby restricted the government's power in contract negotiation matters where a negotiator has asserted an unfounded contract right (Pet. Br. 9), accompanied by a threat of cancellation.

Simplified, the government contends that the rule should be that to avoid a charge of duress, all is required is that the contracting officer contends, "Well, I thought I was right when I threatened the contractor."

To bring this within a recognizable ground of certiorari, the petitioner claims that the decision is in conflict with *Hartsville Mills* v. *United States*, 271 U.S. 43.

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The argument relating to the government's bargaining power is incorrect, and further, it is not a ground for certiorari.

The Court of Claims' opinion in *Urban* made a complete and thorough analysis of the federal law of duress, and petitioner itself states that *Hartsville Mills* is probably not the law today (Pet. Br. 13). That concession would be sufficient to deny the petition but *Hartsville Mills* is not authority for the proposition for which it is stated.

The best analysis of that case can be made by reference to the later case of *Hazelhurst Oil Mill and Fertilizer Co.* v. *United States*, 42 F.2d 331 (1930) wherein it was stated (p. 338) as follows:

> "It is urged on behalf of defendant that the plaintiff is precluded from any recovery by the language used in the opinion of the Supreme Court in *Hartsville Oil Mills* v. *United States*, 271 U.S. 43, the plaintiff therein being a corporation which was in the same position as this plaintiff but the language of the Supreme Court on which the defendant relies we think was intended to apply only to the evidence in that case, which was far from being complete with reference to plaintiff's inquiry and the nature thereof."

The court in *Hazelhurst Oil* then quotes directly and far more extensively than does petitioner on page 13 of the brief from the *Hartsville* case pointing out that the language was intended to refer only to the failure to prove damages.

A reference to the citator and to Williston indi-

cates that the Court of Claims has not failed to follow *Hartsville.* In fact, dozens of claims were later allowed by the Court of Claims without any objection by the government.

Petitioner calls attention in the brief to the footnote in *Anthony Grace;* it is contrary to the contention of petitioner. (*United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424).

It states that:

> "findings and conclusions of the Board of Contract Appeals do not have the same finality on review."

The comparison was to the finality of a decision of the labor arbitrator in *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, as compared with finality of decisions of the Board of Contract Appeals.

The decision in *Anthony Grace* related to a case where the successful bidder on a government contract proposal did not execute the final contract within the time specified by the bid, and the contract was terminated as provided in the offer. An appeal to the Board of Contract Appeals was dismissed as being untimely on appeal; the Court of Claims assigned the case to one of its commissioners as a fact finder instead of remanding to the Board.

The court granted certiorari and held that the administrative record must be made in the Board of Contract Appeals and not in the Court of Claims.

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As to the conclusiveness of the record, the court merely held that the Court of Claims is restricted to the RECORD made in the Board and can not take original evidence.

The court referred to its decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, and approved (p. 428) two procedures when the board has not considered an incidental matter. One, where the record was complete enough to grant judgment for the contractor, it could do so; and two, where the court did not believe the administrative record permitted it to enter a judgment for the contractor, it could stay its own proceedings and remand to the agency for further action.

The latter course is exactly what the Court of Claims has done in this case. It has retained jurisdiction, and it has directed the Board of Contract Appeals to make an equitable determination of the matter under the terms of the contract.

Further, the court in *Anthony Grace* went so far as to state that if the board demonstrated an unwillingness or incapacity to act, a contractor may conclude that those procedures have become "unavailable," and he may proceed directly in the Court of Claims.

The following cases and texts in addition to *Hartsville Mills* previously discussed are cited by petitioner relative to the question of duress.

a) *United States* v. *Bethlehem Steel*, 315 U.S. 289 as to a threat to breach a contract.

b) *Portland Hotel Corp.* v. *Fidelity Storage Corp.*, 134 F.2d 57.

c) 5 Williston, *Contracts* § 1606.

d) Footnote citations (p. 13) as follows:

Williamson v. *Bendix Corp.*, 289 F.2d 389, 392-3 (C.A. 7).

W. R. Grimshaw Co. v. *Nevil C. Withrow Co.*, 248 F.2d 896, 903-905 (C.A. 8).

Bennett v. *Mahon*, 180 F.2d 224, 231 (C.A. 8) (certiorari denied).

Vines v. *General Outdoor Advertising Co.*, 171 F.2d 487 (C.A. 2).

Tri State Roofing Co. of Uniontown v. *Simon*, 142 A.2d 333.

Gill v. *S.H.B. Corporation*, 34 N.W.2d 526.

Val-Rich Corporation v. *Tole Electric Co.*, 196 So. 2d 486.

It is contended (Pet. Br. 13) that a threat must be made in bad faith to constitute duress and further, that the other party was not in a position to have obtained an adequate remedy by suing for damages if the threat were carried out, and the following are cited:

King Construction Co. v. *W.M. Smith Electric Co.*, 350 S.W.2d 940.

Ross Systems v. *Linden Dari-Delite, Inc.*, 173 A.2d 258.

It is contended (Pet. Br. 13) that where contract amendments have been voided for duress, both bad faith and lack of adequate legal remedy was clear, and the following are cited:

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Aircraft Associates v. *United States*, 357 F.2d 373.

W.R.B. Corp. v. *United States*, 183 Ct. Cl. 409, 468-9.

Shewan & Sons v. *United States*, 73 Ct. Cl. 49, 79-95.

Cf. Alloy Products Corporation v. *United States*, 302 F.2d 528, 530.

Hellenic Lines, Ltd. v. *Louis Dreyfus Corp.*, 372 F.2d 753, 756, 758.

5 Williston, *Contracts* 4529-4533, § 1620.

5 Williston, *Contracts* 4501-4502, § 1606.

Automatic Radio Mfg. Co. v. *Hazeltine Research*, 176 F.2d 799, 804-805.

and they are cited for the proposition that none of the authorities suggests that a threat to cancel a contract not subject to cancellation is duress per se.

Bethlehem Steel is an interesting case. It held:

> "Here, it is suggested that feebleness is on the side of the Federal Government of the United States, overpowering strength on the side of a single private corporation. Although there are many cases in which an individual has claimed to be a victim of duress in dealings with the government e.g. *Union Pacific R. Co.* v. *Public Service Comm.*, 248 U.S. 67, this, so far as we know is the first instance in which government has claimed to be a victim of duress in dealings with an individual."

The case pointed out no duress was present since the government could have commandered the plant or compelled the corporation to produce at a price set by the government.

The case has absolutely no factual or legal comparison to the *Urban* case.

Portland Hotel was a case where a landlord threatened eviction unless a tenant consented to an increased rental which was then consented to. Under a claim that the increase was secured by duress, the court held the threat was insufficient to constitute duress.

The case does not appear applicable.

5 Williston, *Contracts*, has previously been cited, and petitioner's brief admits that modern law has abandoned the older rules of duress.

The footnote citations for the proposition that a threat must be made in bad faith and without an adequate remedy are contrary to the petitioner's citation to Williston but are commented upon as follows:

Williamson was a case where an individual claimed the Bendix corporation refused to employ him permanently under a contract for permanent employment. The company defended on the ground of a release which the proposed employer claimed was secured by duress, coercion and under undue influence.

The parties treated the entire claim as duress which under Indiana Law was defined as a threat of bodily restraint to compel execution of an agreement.

Plaintiff was a lawyer and clearly understood the release, its import, and effect upon him.

The case would appear to be obviously inapplicable to the present matter.

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Grimshaw was a case where a subcontractor claimed that he was not required to finish stools and sills as shown on the contractor's plans.

The court held that where the facts which are alleged to constitute duress are not in dispute, the question is one of law. The court held that the fact that the contractor had advised the subcontractor that if it did not perform, it would perform the contract itself or by others was not duress under the facts of the case.

While there is some language to support the proposition for which it is stated, the final conclusion is:

On consideration of the whole record, no facts were present sufficient to support a finding of duress.

Bennett was a case where one party brought action to compel specific performance of an agreement for a partnership relating to the garbage collection of Kansas City, Kansas. The court held the agreement entered into was not entered into by duress; the court holding that the mere refusal to carry out a contract does not in and of itself constitute duress.

The case would not appear to be factually applicable.

Vines was a case involving a claim for quantum meruit services as a salesman of outdoor advertising. The evidence showed that the company advised that it would not enter into a new contract unless certain amounts claimed under a previous contract were waived.

The court stated:

> "The law of duress has been much extended; it is inconsistent with the modern theory of duress to assert as an infallible rule that threatened repudiation of contractual obligation can not amount to duress (citing Williston, § 1620)."

The court did state that the mere threat to repudiate a debt unless the obligee will enter into a contract will not *without more* avoid it.

The case would appear to have no factual application.

Tri State Roofing was a case involving a claim of a "subcontractor" to recover under a roofing contract opposed by claim for delay by the general contractor which was met by a claim for a release from liability for delay and a claim that the release was secured by duress in that the subcontractor threatened not to perform the contract unless the release was signed.

The court stated:

> "To constitute duress or business compulsion, there must be more than a mere threat which might possibly result in injury at some future time, such as a threat of injury to credit in the indefinite future. It must be such a threat that in conjunction with other circumstances and business necessity, the party so coerced fears a loss of business unless he does so enter into the contract as demanded (Reference as to 79 ALR 655-669)."

The case does not appear to be authority for the proposition stated either factually or legally.

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Gill was a case where an owner refused to pay his obligation to a contractor unless the contractor executed a release of all claims.

The court stated that this alone would not constitute duress but analyzed other cases in which that fact coupled with the same financial distress and other facts would constitute duress.

The case if applicable probably holds contrary to the proposition for which it is cited.

Val-Rich was an equity suit for foreclosure of a mechanic's lien in which a defense of duress was alleged claiming that a mechanic caused delay and the lien itself constituted duress.

The court held that this alone when there was a full legal remedy would not constitute duress unless something further were pleaded and the defense was stricken.

The case is likewise not factually or legally applicable.

King Construction was a case where an oral contract for the purchase of a crane was held invalid where the seller proposed to furnish a crane it knew would not meet specification of purchaser's contract with the Atomic Energy Commission, and thereby forced purchaser to get a crane for nearly double the contract amount when purchaser could not secure the crane from any other manufacturer, and no agreement was made to rescind the oral contract.

The case is cited for the proposition that bad faith

was found. The case does not so state. The lower court held there was no duress; the appellate court found to the contrary. The lower court's decision was to the effect that the purchaser executed the second contract out of "fear of economic loss" only which did not constitute duress.

The appellate court merely stated that the seller took "undue advantage of the purchaser."

The appellate court held that "fear of economic loss" did constitute duress (p. 942).

Ross-Systems was a case involving a claim for overcharges for a franchised ice cream mix.

The court said that duress exists when payments are made under duress or "business compulsion" where induced by the wrongful pressure of the payee, and the payor has no immediate and adequate remedy in the courts to resist them.

The lower court had held that the franchisee could have refused payment and defended himself in court.

The appellate court held that adequacy of legal remedy is not a narrow term and embodies the exigencies of the situation in which the victim finds himself.

Aircraft Associates held that a decision of Armed Services Board of Contract Appeals was a decision upon a question of law and was not entitled to finality under the Wunderlich Act.

The facts are that certain airplane parts on planes

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sold by the government had been removed. The contracting officer demanded a release of a claim for the parts as a condition to payment of other obligations and extension for payment of obligations to the government.

The ASBCA held there was no duress. The Court of Claims disagreed, pointing out that the officer knew of the removal of parts and that the extraction of a promise based upon the fault of the promisee constituted duress.

The case is admittedly authority for *Urban's* position, and factually, is almost identical with the case now petitioned; yet, petitioner attempts to cite it for a contrary proposition.

Shewan was exactly contrary to the statement of counsel as to the proposition for which it was cited. The case involved the government holding payment clearly due until the contractor would agree to a complete release of unrelated matters.

The court held the government can not take advantage of its own default to exact a release of substantial claims. Further, that the court held that the conduct of defendant exended beyond the breach of contract remediable at law and constituted duress.

(It should be remembered that here in *Urban* the contracting officer withheld payment from Urban which was later ordered paid by Air Force Attorneys who could find no excuse for withholding it since the amount withheld was admittedly due to the contractor. The contractor could not

release his bond until the claim was paid, and although the withholding was not connected with the execution of the supplemental agreement, it illustrates the propensities of the contracting officer.)

The case of *Freund* v. *United States*, 260 U.S. 60, 67, 70 is cited. In *Freund* a threat to cancel a contract was held by the Supreme Court to constitute duress, and the Court of Claims was reversed with a substantial award allowed.

The court also cited *Union Pacific Railroad Co.* v. *Public Service Commissioner of Missouri*, 248 U.S. 67, 70, where the court pointed out that the government and the contractor are not on equal terms, and the fact that it might indulge in vexatious litigation does not prevent a claim for duress.

There is nothing "per se" about a holding that the factual situation in *Urban Plumbing* constituted duress when the Supreme Court supports the opposite view from that suggested as a reason for granting certiorari.

Alloy Products (*Alloy Products* v. *United States*, 302 F.2d 528, 530) is cited as a case for compulsion, and comparison is suggested.

No comparison seems possible. The Court of Claims was asked to set aside a renegotiation agreement entered into between the plaintiff and the government after studies by competent lawyers for both parties.

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The court found that there was no evidence that the plaintiff had been unlawfully constrained or compelled by another to perform under circumstances which prevented the exercise of a free will.

The case is not factually or legally comparable.

Hellenic Lines is cited under an admission (Pet. Br. 14) that the modern tendency is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into, and which was coerced by fear of a wrongful act by the other party to the transaction.

We agree that it is an excellent authority.

In the *Hellenic* case, the court made a complete and exhaustive study of the law including the *Hartsville Mill* case.

The court pointed out (p. 757):

> ". . . it is obvious that there is no line of absolute demarcation between fear that deprives a person of free will and judgment and lesser degrees of fear . . . moreover the nature and extent of the pressure is inseparable from the subject. The pressure must be improper and excessive in going beyond what is reasonable under the circumstances in order to constitute either duress or undue influence."

The court further pointed out:

> "A key element today is the state of mind of the person threatened. This is not to say that the existence of choice necessarily disposes the existence of duress."

The court went on to quote Mr. Justice Holmes that choosing the lesser of two evils is a "characteristic of duress."

Automatic Radio was a case involving a mere threat to resort to civil litigation which the court held was insufficient in and of itself to constitute duress under the facts of that case referring to a patent licensing agreement.

The case adds nothing to the petitioner's claim for certiorari.

Where the Court of Claims under an undisputed factual situation has merely determined that the contracting officer should have used, the contract clause referring to unforeseeable delays instead of a threat of cancellation unless his demands are met, the court has acted fully within its powers. (*United States* v. *Utah Construction Co.*, 384 U.S. 394, (416-417).

The foregoing thirteen cases cited in footnote 14 of petitioner's brief (p. 13) are a very small fraction of the state and federal cases in which the matter of duress is discussed.

They were apparently selected because they are opinions in which the various courts in some of the cases referred to the BAD FAITH of the "duressor."

The conclusion which petitioner desires to force upon this court is that this court should adopt a rule for all federal courts that if the "duressor" knows that he is acting in bad faith in the threatening contract termination, then this act may constitute dur-

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ess, but if he testifies that he thought he was correct in threatening contract termination, it would not consitute duress.

It is obvious that this is not the function of certiorari, and of course, could never be the law. Duress is universally held to depend on the factual situations of each case and depends in some cases on such variables as the personality of the individual "duressed."

However, the Court of Claims in *Urban* did not lay down a "per se" rule of duress as claimed. In this case, the undisputed evidence was that the contracting officer knew that the government had delayed the contractor, refused to consider factually a reasonable time which that delay caused the contractor, and offered a time extension which was determined by the Board of Contract Appeals to be obviously inadequate knowing that even if the contractor should accept it that the government itself could not because he had been secretly notified by the base engineer that he would not permit a shutdown of any heating equipment during the Alaska winter in order to make the changeover (Pet. Br. App. 32-33). In order to force the contractor to accept the 245-day extension, he threatened cancellation, a situation which the Board of Contract Appeals found to be unthinkable in the heart of the most severe winter ever recorded in Alaska, a finding which was accepted by the Court of Claims and not opposed by the government in the Court of Claims or elsewhere.

It was a matter of law. (*W. R. Grimshaw* v. *Nevil C. Withrow Co.*, 248 F.2d 896 (C.A. 8).

An examination of supplemental decisions to the annotation in 79 A.L.R. 655 regarding "business compulsion" discloses that there are 78 cases cited in addition to those cited in the annotation. Those 78 cases are from 24 jurisdictions. Petitioner cites only 13 cases relating to all types of duress from five jurisdictions while two additional jurisdictions cited admittedly were contrary to petitioner's claim.

It might be interesting in passing to note that in a dissenting opinion in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, in 1958, Justice Harlan stated in respect to the tenacity of the Court of Claims:

> "The Court of claims certainly not given to the easy allowance of demands upon the public treasury faced up to what the Constitution plainly requires in this instance."

When the petitioner claims (Pet. Br. 14) that the Court of Claims had adopted a "per se" rule relating to duress, it is grossly unfair and totally in error. A reading of the Court of Claims' opinion will totally dispell any such contention.

Reading the petitioner's claims objectively, it is believed that petitioner wishes this court to put its stamp of approval on the conduct of the contracting officer in threatening termination for events for which the government bore the sole responsibility.

A holding to the contrary is no jeopardy to the government's negotiating position as this case bears

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witness. The contractor has sustained *government-audited* out-of-pocket direct (no overhead, profit, etc.) expenses of $80,000 due to it since 1962 (interest alone at 6% is 42%). It has had the additional privilege of paying for litigation cost and travel expense from Fairbanks, Alaska, to Dayton, Ohio, to San Francisco, California, to Portland, Oregon, to Washington, D. C., in addition to helping finance the government's defense of this case in opposition.

In quoting statistics, one can not help but inquire how many well-founded claims have been denied merely on account of the citizen's inability to finance the steps in litigation through which the government at taxpayer's expense may take an opposing litigant. The contract officer needs no further weapons in his arsenal to deal with recalcitrant contractors.

The "government" (all of us) had the benefit of the contractor's work, labor, skill, and money, and it surely should compensate it fairly, and the first ground for certiorari would appear to be untenable.

The Wunderlich Act permits the Court of Claims to find exactly as it did, and no ground for certiorari would appear to exist unless the court wishes to generally exercise its discretion (Part V, Rule 19, Rules of the Supreme Court).

The other ground stated in support of the petition (Pet. Br. 15) is that the Board rejected the finding of the Board, and "in effect" entered its own findings contrary to the mandate of the Wunderlich Act, 41 U.S.C. 321 which confines the Court of Claims'

review of facts to a determination of whether or not there was "substantial evidence" to support a fact found by a contract board.

Because of what would appear to be a mistaken belief as to what the Board of Contract Appeals actually found, the petitioner arrives at a completely erroneous conclusion.

Petitioner assumed that the Court of Claims reexamined the factual matter of whether or not a contractor in submitting for approval or rejection a product which did not conform in exact particulars to a "named brand" contributed to the delay in performance of a contract by offering such a submittal (Pet. Br. 17).

It was admitted, however, that the claimed reexamination of factual matter was "in effect" accomplished by ignoring "substantial evidence." (Pet. Br. 17).

That belief is mistaken because the submission of a product for approval or rejection was exactly what the contractor had a duty to do under the contract even as to brand-name products called for by the specifications. The interpretation of contractual provisions are legal matters on which a Board's decision is not final under the Wunderlich Act.

There was simply never an issue about that matter, and of course, the court ignored it.

Both the Board and the court found that the failure to appoint an approval engineer and an extended

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period in rejection after such an appointment was finally made were the causes of delay. There was no dispute in evidence, and there was and is now no dispute as to the determination of that fact.

The matter upon which counsel mistakenly relies is whether or not the products submitted were or were not in conformity to the "or equal" clauses of the specification, a point which was completely unnecessary to the Board or the court's determination of the case, and concerning which there was not any issue.

The other matter to which petitioner refers was not an issue either before the board or before the court (Pet. Br. 19). That reference related to the Board's statement relating to the coal thaw shed which was a portion of the contract completely unrelated to the matter of delay relating to "approval or rejection" of drawings.

No evidence (except incidental) was ever directed toward delay in the coal thaw shed. The government had never at any time prior to the hearing made a contention about any such delay or its relation to the total performance of the contract. A prehearing order was entered into between the parties defining the issues. Delay in the completion of that portion of the work was not in issue ever. The prehearing order was printed as Exhibit A to plaintiff's motion for summary judgment in the Court of Claims (Tr. 28 and 31-2).

Neither the question of delay resulting from sub-

mittals was made an issue nor was any question of delay in completing the coal thaw shed. The reference by the Board of Contract Appeals to the fact that it could only find three days' delay in the coal thaw shed work caused by the government was a mere gratuity. No evidence was ever directed toward that point since it wasn't an issue.

As stated in the brief before the Court of Claims, if it *had* been an issue, the evidence would have shown that the work in the coal thaw shed was completed at the time of the extension and that no one made any reference at any time to any delay (Ct. Cl. Br. 68-9).

Citations as to the second point (Court of Claims' review of decisions of a board) admit that the Wunderlich Act was intended to liberalize the review of decisions of such boards in the same manner as could any other reviewing court (Tr. 16).

But, complains petitioner, the Court of Claims is going beyond its authority.

In support of this contention, it cites *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, and *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424.

Bianchi and *Anthony Grace* have previously been discussed, and are not applicable since nothing this court has done in the *Urban Plumbing* decisions conflicts with those decisions. The Court of Claims has

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not created a new record by its own commissioner as was attempted on *Anthony Grace*, but on the contrary has exactly conformed to the suggested dispositions outlined in the *Grace* and *Bianchi* decisions.

The Court of Claims certified the administrative record in this case (*Urban Plumbing*) to one of its commissioners who found the record did not contain any factual question to review, and returned it to the Court of Claims for purely legal determination.

Utah Construction (1966) was a case in which the contractor was to build a facility for the Atomic Energy Commission. The contract provided that factual disputes should be determined by the contracting officer subject to appeal to the head of the department whose decision was to be final and conclusive.

After completion, the contractor filed claims for additional compensation and time extensions pursuant to the "changed conditions" clause of the contract.

The Board of Contract Appeals:

1. Denied the request for time extension and damages for the "pier drilling" claims on the ground that the increased costs were incurred by the subcontractor rather than the contractor and that the delay was caused by a dispute over government-supplied concrete aggregate which was a matter not before the board.

2. Denied compensation for but allowed additional time for the "shield window" claim.

3. Ruled that the appeal from the contractor's rejection of the claim for additional compensation for poor quality aggregate was untimely and remarked that if the claim was based upon unliquidated damages for breach of warranty or delay, it (the board) had no jurisdiction to grant monetary relief.

Respondent filed a direct action in the Court of Claims for breach of contract asserting government-caused unreasonable delay.

The Court of Claims held that the "pier drilling" and "shield window" claims were primarily for breach of contract and ordered a trial de novo on the factual issues in those claims.

It held that since the concrete aggregate claim was for "breach of contract" rather than "arising under" the contract, the factual issue should be resolved in a judicial trial.

The Supreme Court granted certiorari and affirmed the court on the proposition that liability for breach of contract claims do not lie within the jurisdiction of the Board of Contract Appeals and further held that contractors do not need to process breach of contract matters through the Board of Contract Appeals before filing suit in the Court of Claims.

The court found that the claim of poor quality aggregate was a claim for breach of contract and affirmed the Court of Claims.

As to the "pier drilling" and "shield window"

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claims, the court agreed that the board lacked authority to consider "delay damages" for those claims.

However, the court held that the board did have authority to consider time extensions under specific contract provisions, and if those requests called for "fact finding" such facts would be (if properly supported) conclusive on the parties, not only under the contract provisions but also under the court action for breach of contract and delay damages.

The court then discussed the doctrine of "collateral estoppel" and the needless duplication of "evidentiary hearings." (p. 420 et seq.).

It is thus apparent that *Utah Construction* was concerned with the distinction between breach of contract cases not within the board's jurisdiction and factual matters under the contract which were within the board's jurisdiction.

The court pointed out that no matter what the claim is labeled or what action the board may have taken, the board had no jurisdiction of claims for breach of contract even if it considered and passed upon those claims.

In Urban Plumbing, the stipulated issue before the Board of Contract Appeals was whether or not a contract modification constituted an "accord and satisfaction."

The government claimed it did, and the contractor cliamed that it did not. The contractor claimed that it did not for several reasons: (1) No meeting of

minds; (2) no consideration; (3) lack of reality of assent (duress) etc.; the contractor also claimed that the construction of the modification after its language was changed was understood to permit a claim for additional costs should such added costs materialize under the extension demanded by the government."

Both the contract provisions and the Wunderlich Act provided that the contracting officers' decision, that of a department head or other fact finder should not be final on a question of law.

What constitutes an accord and satisfaction is a legal question. The board's opinion made no reference to that legal question except to hold that there was no duress because when the time set for performance of the contract had expired (even though admittedly, the fault of the government), the contractor was "in default" and the contractor had a right to cancel the contract, and when he threatened to cancel the contract, he did what he had a legal right to do.

That finding is now (for the first time) admitted to be in error (Pet. Br. 20, n. 17).

But says the petitioner even if in error, the court must remand to the Board to redetermine that matter after instructing the Board as to the proper law, and the Court of Claims can not for itself determine whether or not the action of the contracting officer constituted duress.

Where the facts are not in dispute, the matter always becomes a question of law (*W. R. Grimshaw Co.* v. *Nevil* v. *Withrow, supra.*

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The undisputed facts are that the government delay in appointing an approval engineer, and in rejection or approval of products submitted was the cause of the need for a contract extension.

The contract modification itself so states.

The Court of Claims examined the evidence carefully. It stated that it believed that the board had so found as a fact but that if it had not, it would so find because there was no substantial evidence to the contrary, and minds could not differ as to the evidence (Pet. Br. App. 21).

How then can petitioner claim that the Court of Claims ignored evidence when the opinion itself states that the court carefully examined the evidence?

As repeatedly stated, the evidence was from petitioner's files and its own witnesses by which it is bound; the contract modification says the reasons upon which it was based.

It can only be concluded that the claim for certiorari comes from the conclusion of some government counsel unfamiliar with the records of this case because the basic propositions are admitted both factually and legally or are based upon findings which petitioner itself claims are conclusive.

Respondent has read the cases cited in page 22 of petitioner's brief. Many of those have been cited in the briefs before the Court of Claims. It is apparent that petitioner believes the Court of Claims in those cases has reviewed and rejected administrative findings.

Respondent finds no basis for such a conclusion from a reading of the decisions of those cases.

If petitioner knows of facts not apparent from the various opinions on which the judgments were based, respondent is not in a position to comment thereon without access to the same information if any exists.

A reading of the various opinions indicated to respondent that in almost all if not all of the decisions, the Court of Claims has been extremely careful to follow the Wunderlich Act, and the decisions of the Supreme Court, in each case, explaining any variations which might be misleading:

But whether that position is correct or incorrect, the case of *"Urban Plumbing"* does not fall within the factual matter of those cases (particularly [1]*Woodcrest Construction Co.* v. *United States*, 408 F.2d 406, which petitioner seeks to associate with the petition for certiorari in this case). Nor does *Urban Plumbing* fall within the prohibition of analogies of the *Utah Construction, Anthony Grace* or *Carlos Bianchi* decisions of this court.

The court here did not treat this cause as a breach of contract case, but actually did exactly as petitioner claims it should have done: It adopted a board finding: (1) that there was admitted delay under the

[1] Woodcrest was referred to a court of claims commissioner for factual hearings and was decided by a divided court. Urban was referred to a court of claims commissioner who made no factual review and returned it to the court of claims for determination of the legal matters. The Urban case was decided by a unanimous court.

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state of facts; (2) that there was a finding that the delay was admitted by the fault of the government; (3) that there was machinery under the "equitable adjustment provisions under the contract to determine a just compensation; and (4) directed that the board should proceed to make an equitable award to the contractor under the contract.

For the reasons stated, the petition should be denied.

WARDE H. ERWIN